

# **EXHIBIT S**

AO 88 (Rev. 1/94) Subpoena in a Civil Case

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

**SUBPOENA IN A CIVIL CASE**

In re LUPRON MARKETING AND SALES  
PRACTICES LITIGATION

CASE NUMBER: MDL DOCKET NO. 1430  
Master File No. 01-CV-10861  
Judge Richard G. Stearns (D. Mass.)

TO: Office of the General Counsel

United States Department of Health and Human Services  
Room 711-E  
200 Independence Avenue, S.W.  
Washington, D.C. 20201

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

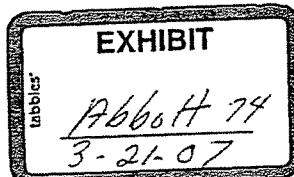
See EXHIBIT A (attached)

PLACE	DATE AND TIME
Joshua T. Buchman, Esq. McDermott, Will & Emery 227 West Monroe Street Chicago, IL 60606-5096 (312) 372-2000	January 5, 2004

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Michael S. Nadel, D.C. Bar # 470144 (Attorney for Abbott Laboratories) McDermott, Will & Emery 600 Thirteenth Street Washington, D.C. 200005 (202) 756-8000	10-23-03

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

AO 88 (Rev. 1/94) Subpoena in a Civil Case



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**PROOF OF SERVICE**

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DATE

PLACE

SERVED ON (PRINT NAME)

MANNER OF SERVICE

SERVED BY (PRINT NAME)

TITLE

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**DECLARATION OF SERVER**

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I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on \_\_\_\_\_

DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

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Rule 45, Federal Rules of Civil Procedure, Parts C & D:

## (c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or  
 (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

## (d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

**ATTACHMENT A TO SUBPOENA TO HHS**

**PRELIMINARY STATEMENT**

Abbott Laboratories ("Abbott"), TAP Pharmaceutical Products Inc. and TAP Pharmaceuticals Inc. (collectively "TAP"), and Takeda Chemical Industries, Ltd. ("Takeda") are serving this Subpoena on the Office of the General Counsel of the United States Department of Health and Human Services ("HHS") pursuant to Rule 45 of the Federal Rules of Civil Procedure and 45 C.F.R. § 2.5.

**DEFINITIONS**

1. "Document" means the original and each non-identical copy of a document in any medium, including electronic form, whether or not it was communicated to any person other than the author, and shall include but not be limited to, writings, printings, photographs, photocopies, tapes, recordings, video recordings, electronic data, e-mails, and any other symbolic representations in the possession, custody or control of Plaintiffs or known or believed by Plaintiffs to exist.
2. "Copy" or "Copies" when used in reference to a document means any color or black-and-white reproduction of a document, regardless of whether the reproduction is made by means of carbon paper pressure, sensitive paper, photostat, xerography or other means or process.
3. "Correspondence" means all communications between two different persons or entities, including e-mail and other forms of electronic communications.
4. "Home drug infusion therapy services" means the administration of drugs at the patient's home using an infusion pump.

5. "Home nebulizer treatments" means the administration of drugs at the patient's home by means of a nebulizer.

6. "AWP" shall refer to the published Average Wholesale Price as reported in pharmaceutical pricing compendia, such as the Red Book and First Data Bank.

7. "HHS" means the United States Department of Health and Human Services and all constituent agencies.

8. "CMS" means Centers for Medicare and Medicaid Services, formerly known as Health Care Financing Administration ("HCFA"), and encompasses the Social and Rehabilitation Service ("SRS"), HCFA's predecessor in the administration of the Medicaid program.

9. "OIG" means the HHS Office of Inspector General.

10. "Carrier" shall mean and refer to any and all insurance companies or other entities that have contracted with HCFA or CMS at any time from Jan. 1, 1985 to the present to process claims submitted under Part B of the Medicare program.

11. "Relating to" means all information, facts and/or documents that directly, indirectly or in any other way support, negate, bear upon, touch upon, incorporate, affect, include, pertain to and/or are otherwise connected with the subject matter about which a request is being made.

12. "Communication" means the transmission, sending and/or receipt of information of any kind by and/or through any means including but not limited to speech, writings, language, computer electronics of any kind, magnetic tape, video tape, photographs, graphs, symbols, signs, magnetic disks, sound, radio and/or video signal, telephone, teletype, telecommunication, telegram, microfilm, microfiche, photographic film of any type and/or other media of any kind.

13. "And" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request any information that might otherwise be construed to be outside its scope.

14. The singular form of a noun or pronoun shall include within its meaning the plural form of the noun or pronoun and vice versa; the masculine form of a pronoun shall include within its meaning the feminine form of the pronoun, and vice versa; and the use of any tense of any verb shall include within its meaning all other tenses of the verb.

#### INSTRUCTIONS

1. Abbott, TAP, and Takeda request that HHS certify that the records it produces are true and correct copies.

2. Unless the request specifically relates to an earlier time period, the requests below refer to the period of January 1, 1991 to the present

3. The headings provided in the document requests, below, are intended to assist HHS in locating responsive documents by setting forth general categories, and should not be relied upon to modify in any way the actual numbered requests.

4. Please produce documents as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request. The following constituents within HHS are believed by Abbott, TAP, and Takeda to be in possession of documents responsive to this subpoena: (a) HHS Main Office and Regional Offices; (b) HHS Office of General Counsel; (c) OIG; (d) CMS; and (e) Public Health Service.

5. Provide the following information for each document withheld on the grounds of privilege:

- (a) its date;
- (b) its title;

- (c) its author;
- (d) its addressee;
- (e) the identity of each person who received and/or saw the original or any copy of such document;
- (f) the specific privilege under which it is withheld;
- (g) its general subject matter;
- (h) its present custodian(s); and
- (i) a description of the document adequate to support the contention of privilege.

**DOCUMENTS TO PRODUCE**

**Regulatory Documents Regarding Medicare or Medicaid Drug Reimbursement**

1. All documents relating to the promulgation of a regulation concerning Medicare reimbursement for prescription drugs, effective January 1, 1992, including all comments on the proposed and final regulation, all drafts of the regulation, and all memoranda, correspondence, analyses and other documents concerning the regulation. (The Notice of Proposed Rulemaking for the regulation was published at 56 Fed. Reg. 25,860 (June 5, 1991), and the Notice of Final Rule was published at 56 Fed. Reg. 59,424 (Nov. 25, 1991).) This request seeks only documents relating to reimbursement by Medicare of prescription drugs, and not documents related to other matters covered by the regulation in question.

2. All documents relating to the promulgation of a regulation concerning Medicare reimbursement for prescription drugs, effective January 1, 1999, including all comments on the proposed and final regulation, all drafts of the regulation, and all memoranda, correspondence, analyses and other documents concerning the regulation. (The Notice of Proposed Rulemaking

for the regulation was published at 63 Fed. Reg. 30,818 (June 5, 1998), and the Notice of Final Rule was published at 63 Fed. Reg. 58,814 (Nov. 2, 1998).) This request seeks only documents related to reimbursement by Medicare of prescription drugs, and not documents relating to other matters covered by the regulation in question.

3. From 1985 to the present, all documents relating to the promulgation of a regulation concerning Medicaid reimbursement for prescription drugs published at 34 Fed. Reg. 1,244 (January 25, 1969), codified at 45 C.F.R. § 250.30(b)(2) (1970), including all comments on the proposed and final regulation, all drafts of the regulation, and all memoranda, correspondence, analyses and other documents concerning the regulation. This request seeks only documents related to reimbursement by Medicaid of prescription drugs, and not documents related to other matters covered by the regulation in question.

4. From 1974 to the present, all documents relating to the promulgation of a regulation concerning Medicaid reimbursement for prescription drugs, effective July 1976, including all comments on the proposed and final regulation, all drafts of the regulation, and all memoranda, correspondence, analyses and other documents concerning the regulation. (The Notice of Proposed Rulemaking for the regulation was published at 39 Fed. Reg. 41,480 (Nov. 27, 1974), and the Notice of Final Rule was published at 40 Fed. Reg. 34,516 (Aug. 15, 1975).) This request seeks only documents related to reimbursement by Medicaid of prescription drugs, and not documents relating to other matters covered by the regulation in question.

5. From 1985 to the present, all documents relating to the promulgation of a regulation concerning Medicaid reimbursement for prescription drugs, effective in 1987, including all comments on the proposed and final regulation, all drafts of the regulation, and all memoranda, correspondence, analyses and other documents concerning the regulation. (The

Notice of Proposed Rulemaking for the regulation was published at 52 Fed. Reg. 28,648 (July 31, 1987).) This request seeks only documents related to reimbursement by Medicaid of prescription drugs, and not documents relating to other matters covered by the regulation in question.

6. From 1985 to the present, all documents relating to the decision that Medicare covers prescription drugs provided incident to durable medical equipment, including all documents related to Section 2100.5 of the Medicare Carrier's Manual, and all revisions or modifications thereto.

7. All documents relating to HCFA/CMS's actual or proposed use of its "inherent reasonableness" authority in connection with Medicare reimbursement of prescription drugs.

Audits, Reviews, Analyses, Reports and Publications

8. From 1985 to the present, all documents relating to OIG audits and reports regarding reimbursement or payment for prescription drugs by Medicare, Medicaid, the Department of Veterans Affairs or any other federal agency or federal health benefits program, including drafts, work papers, surveys, survey responses, interview summaries, correspondence, notes, and all responses and drafts of responses to OIG audits and reports.

9. From 1985 to the present, all documents relating to reviews of drug purchase prices by pharmacies in Arkansas, Louisiana, New Mexico, Oklahoma and Texas, performed by HCFA Region VI and referenced in Louisiana v. Department of Health and Human Services, 905 F.2d 877, 882 (5<sup>th</sup> Cir. 1990).

10. From 1985 to the present, all documents relating to efforts by HCFA or CMS, Carriers or other Medicare contractors to determine acquisition costs of drugs, including efforts to determine "estimated acquisition cost" pursuant to 42 C.F.R. § 405.517 (1992).

11. All documents relating to a report prepared for CMS by PricewaterhouseCoopers entitled "A Study of Pharmaceutical Benefit Management" (June 2001), and referenced at 67 Fed. Reg. 10,285 (March 6, 2002), including the report, drafts of the report, correspondence relating to the report, and all documents relating to the engagement of PricewaterhouseCoopers to prepare the report.

12. From 1968 to the present, all documents relating to a report prepared by the Task Force on Prescription Drugs, the Office of the Secretary, United States Department of Health, Education and Welfare, entitled "The Drug Makers and the Drug Distributor" and dated December 1968.

13. From 1985 to the present, all OIG correspondence with Congress, including Semi-Annual Reports, regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

14. From 1985 to the present, all OIG Red Books and Orange Books relating to Medicare's or Medicaid's method of reimbursement for prescription drugs.

15. All documents relating to committees or task forces within HHS that review, consider, establish, or alter policies for Medicare reimbursement for prescription drugs, including agendas and minutes of meetings, correspondence, memoranda, lists of members, and notes.

16. All documents relating to efforts by CMS, HCFA or Carriers to base Medicare reimbursement for prescription drugs on the "least costly alternative" or any standard other than AWP.

17. All documents relating to efforts by the Department of Justice to consider, calculate, or apply average wholesale prices that differ from the AWPs for the prescription drugs

published in pharmaceutical industry pricing compendia, such as the Red Book and First Data Bank.

18. All documents relating to efforts by CMS, HCFA or Carriers to consider, calculate or apply average wholesale prices that differ from the published AWPs for the prescription drugs.

19. From 1985 to the present, all documents considering hypothetical, proposed or actual federal legislation concerning Medicare or Medicaid reimbursement for prescription drugs.

20. To the extent not covered above, from 1985 to the present, all HHS reviews, studies, analyses, audits and reports relating to the fact that AWP commonly exceeds the actual sales price or acquisition cost of a drug.

21. To the extent not covered above, from 1985 to the present, all HHS reviews, studies, analyses, audits and reports relating to the fact that AWP commonly exceeds the actual average wholesale price of a drug.

Communications with State Government Entities Regarding  
AWP or Medicaid Drug Payments

22. From 1985 to the present, all written communications with any State Medicaid agency regarding Medicaid reimbursement for prescription drugs.

23. From 1985 to the present, all documents relating to non-written communications, such as meetings or phone conversations, with any State Medicaid agency regarding Medicaid reimbursement for prescription drugs.

24. From 1985 to the present, all documents relating to CMS, HCFA, or SRS policies, regulations, rules or standards related to Medicaid reimbursement for prescription drugs.

25. From 1985 to the present, all written communications with any State Medicaid agency regarding the possibility that CMS or HCFA might disapprove a State Medicaid plan due to the manner in which a proposed or existing State Medicaid program reimburses for prescription drugs.

26. From 1985 to the present, all documents relating to non-written communications, such as meetings or phone conversations, with any State Medicaid agency regarding the possibility that CMS or HCFA might disapprove a State Medicaid plan due to the manner in which a proposed or existing State Medicaid program reimburses for prescription drugs.

Communications with Federal Government Entities or Government Contractors  
Regarding AWP or Medicare Drug Reimbursement

27. All written communications with any Carrier, Carrier Advisory Committees, or other Medicare contractor, regarding the method(s) by which Medicare reimburses for prescription drugs.

28. All documents relating to non-written communications, such as meetings or phone conversations, with any Carrier, Carrier Advisory Committees or other Medicare contractor regarding Medicare's method of reimbursement for prescription drugs.

29. All written communications with the Office of Management and Budget regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs, including the performance of surveys or other actions to determine the estimated acquisition cost of prescription drugs under 42 C.F.R. § 405.517 (1992).

30. All documents relating to non-written communications with the Office of Management and Budget regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs, including the performance of surveys or other actions to determine the estimated acquisition cost for prescription drugs under 42 C.F.R. § 405.517 (1992).

31. All written communications with Members of Congress, their staff, or any Congressional committees regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

32. All documents relating to non-written communications, such as meetings or phone conversations, with Members of Congress, their staff, or any Congressional committees regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

33. All written communications with the Office of Technology Assessment regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

34. All documents relating to non-written communications, such as meetings or phone conversations, with the Office of Technology Assessment regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

35. All written communications with the General Accounting Office regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

36. All documents relating to non-written communications, such as meetings or phone conversations, with the General Accounting Office regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

37. All written communications with the Congressional Budget Office regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

38. All documents relating to non-written communications, such as meetings or phone conversations, with the Congressional Budget Office regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

39. All written communications with the Department of Justice regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

40. All documents relating to non-written communications, such as meetings or phone conversations, with the Department of Justice regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

41. All written communications with the Department of Justice regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

42. All written communications with the Office of the President of the United States regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs, including all documents related to the Medicare prescription drug provisions of any President's annual proposed budgets and President Clinton's December 13, 1997 radio address to the nation.

43. All documents relating to non-written communications, such as meetings or phone conversations, with the Office of the President of the United States regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs, including all documents related to the Medicare prescription drug provisions of any President's annual proposed budgets and President Clinton's December 13, 1997 radio address to the nation.

44. To the extent not covered by the above requests, all written communications between HHS or any HHS constituent agency and any state or federal governmental entity outside HHS regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

45. To the extent not covered by the above requests, all documents relating to non-written communications, such as meetings and phone conversations, between HHS or any HHS constituent agency and any state or federal governmental entity outside HHS regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

Communications with Non-Governmental Entities Regarding  
AWP or Medicare or Medicaid Reimbursement of Drugs

46. All written communications with pharmaceutical manufacturers or associations representing or consisting of pharmaceutical manufacturers regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

47. All documents relating to non-written communications, such as meetings or phone conversations, with pharmaceutical manufacturers or associations representing or consisting of pharmaceutical manufacturers regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

48. All written communications with publishers of pharmaceutical pricing compendia regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

49. All documents relating to non-written communications, such as meetings and phone conversations, with publishers of pharmaceutical pricing compendia regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

50. All written communications with pharmacists, pharmacies, or associations representing or consisting of pharmacies or pharmacists, regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

51. All documents relating to non-written communications such as meetings and phone conversations, with pharmacists, pharmacies, or associations representing or consisting of pharmacies or pharmacists, regarding Medicare's or Medicaid's method of reimbursement for prescription drugs.

52. All written communications with health care providers, or associations representing or consisting of health care providers, including the American Society of Clinical Oncology and the American Urology Association, regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

53. All documents relating to non-written communications, such as meetings or phone conversations, with health care providers, or associations representing or consisting of health care providers, including the American Society of Clinical Oncology, regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

54. All written communications with health care providers regarding agreements between insurers and providers pursuant to which health care providers waive coinsurance or copayment amounts required under Medicare, including agreements between insurers and physicians that require physicians to waive Medicare copayment obligations as a condition of participation in insurance company networks.

55. All documents relating to non-written communications, such as meetings or phone conversations, with health care providers regarding agreements between insurers and providers pursuant to which health care providers waive coinsurance or copayment amounts required under Medicare, including agreements between insurers and physicians that require physicians to waive Medicare copayment obligations as a condition of participation in insurance company networks.

56. All written communications with cancer survivors or cancer patients, or associations representing or consisting of such individuals, the National Coalition for Cancer Survivorship, regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

57. All documents relating to non-written communications, such as meetings or phone conversations, with cancer survivors or cancer patients, or associations representing or consisting of such individuals, including the National Coalition for Cancer Survivorship, regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

58. All written communications with private insurers, Carriers, ERISA plan administrators, health maintenance organizations, Blue Cross organizations or other non-governmental third-party payors regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

59. All documents relating to non-written communications, such as meetings or phone conversations, with private insurers, Carriers, ERISA plan administrators, health maintenance organizations, Blue Cross organizations or other non-governmental third-party payors regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

60. To the extent not covered above, all written communications with non-governmental entities, including the press, healthcare providers, associations and members of the general public, regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs.

61. From 1985 to the present, copies of all Freedom of Information Act requests submitted to HHS or any HHS constituent agency seeking documents regarding the method(s) by which Medicare and/or Medicaid reimburse for prescription drugs, all responses thereto, and all documents produced in response to such requests.

HHS Administrative and Judicial Litigation Concerning AWP

62. From 1985 to the present, all documents relating to Amendment 87-33 to the Louisiana State Medicaid plan. (To facilitate the search for responsive documents, note that HCFA published a Notice of hearing on this matter at 53 Fed. Reg. 29,381 (Aug. 4, 1988).)

63. From 1985 to the present, all documents relating to In re Disapproval of Louisiana State Plan Amendment No. 87-33, No. 88-11 (HCFA Administrator June 9, 1989), including

briefs and other filings, exhibits, correspondence, hearing and other transcripts, rulings and opinions.

64. From 1985 to the present, all documents relating to State of Louisiana v. United States Department of Health and Human Services, No. 89-4566, opinion reported at 905 F.2d 877 (5th Cir. 1990), including briefs, exhibits, appendixes, the Administrative Record, all other filings, correspondence, and transcripts of oral argument.

65. From 1985 to the present, all documents relating to Amendment 88-05 to the Arkansas State Medicaid plan, including all documents relating to administrative proceedings regarding HCFA's decision to disapprove Amendment 88-05 to the Arkansas State Medicaid plan, such as briefs and other filings, exhibits, correspondence, hearing and other transcripts, rulings and opinions. (To facilitate the search for responsive documents, note that HCFA published a Notice of hearing on this matter at 53 Fed. Reg. 45,587 (Nov. 10, 1988).)

66. From 1985 to the present, all documents relating to administrative proceedings regarding HCFA's refusal to pay the federal portion for certain Arkansas Medicaid reimbursement for prescription drugs in 1989, including briefs and other filings, exhibits, correspondence, hearing and other transcripts, rulings and opinions. (To facilitate the search for responsive documents, note that the HHS Department Appeals Board issued decisions regarding this matter on Aug. 22, 1991 (Decision No. 1273) and Apr. 29, 1992 (Decision No. 1329).)

67. From 1985 to the present, all documents relating to an amendment to the Oklahoma State Medicaid plan submitted in October 1987, and revised in March 1988, concerning Oklahoma Medicaid reimbursement for prescription drugs.

68. From 1985 to the present, all documents relating to administrative proceedings regarding HCFA's decision to disapprove Amendment 87-18 to the Oklahoma State Medicaid

plan including but not limited to briefs and other filings, exhibits, correspondence, hearing and other transcripts, rulings and opinions. (To facilitate the search for responsive documents, note that HCFA published a Notice of hearing on this matter at 53 Fed. Reg. 38,979 (Oct. 4, 1988).)

69. From 1985 to the present, all documents relating to an amendment to the Oklahoma State Medicaid plan submitted in April 1989 concerning Oklahoma Medicaid reimbursement for prescription drugs, including all documents relating to administrative proceedings regarding HCFA's refusal to pay the federal portion for certain Oklahoma Medicaid reimbursement for prescription drugs in 1989, such as briefs and other filings, exhibits, correspondence, hearing and other transcripts, rulings and opinions. (To facilitate the search for responsive documents, note that the HHS Department Appeals Board issued a decision regarding this matter on Aug. 13, 1991 (Decision No. 1271).)

70. To the extent not requested above, from 1985 to the present, all documents relating to any administrative or judicial proceedings involving actual or threatened action by CMS/HCFA/SRS to disapprove a State Medicaid plan or plan amendment, or to disallow federal financial participation, due to alleged excessive Medicaid reimbursement for prescription drugs.

71. To the extent not requested above, from 1985 to the present, all documents relating to any administrative or judicial proceedings concerning the appropriateness of AWP as a measure for reimbursement for prescription drugs.

Medicare Reimbursement for Professional Services of Oncologists

72. Copies of the federal supply schedule for drugs for each year.

73. All documents relating to setting the Medicare fee schedule payments for professional services for the administration of chemotherapy or other drugs used in connection with treatment of cancer.

74. All documents relating to whether Medicare adequately reimburses oncologists or other doctors for professional services for the administration of chemotherapy or other drugs used in connection with treatment of cancer.

75. All documents relating to the computation of the practice expense component used or considered for use to derive the Medicare physician fee schedule for the administration of chemotherapy or other drugs used in connection with anticancer chemotherapy treatment.

Home Drug Infusion Therapy and Nebulizer Treatments

76. All documents relating to whether Medicare adequately reimburses providers for the provision of home drug infusion therapy services, including all documents evidencing that Medicare reimbursement for drugs is the means by which providers of professional services associated with home drug infusion therapy are reimbursed for such services.

77. All documents relating to whether Medicare adequately reimburses providers for the provision of home nebulizer treatments, including all documents noting that Medicare reimbursement for drugs constitutes the means of reimbursing providers for professional services associated with home nebulizer treatments.

HHS Organizational Documents

78. All organizational charts for HHS, HHS Central and Regional Offices, HCFA/CMS, OIG and the Public Health Service.

79. All document retention or destruction policies for HHS, HHS Central and Regional Offices, HCFA/CMS, OIG and the Public Health Service.

80. Documents sufficient to describe the manner by which electronic documents, including e-mails, are preserved or deleted, for HHS, HHS Central and Regional Offices, HCFA/CMS and OIG.

81. Documents sufficient to identify the name and address of all Medicare Carriers and fiscal intermediaries.

82. Copies of contracts with Medicare Carriers and fiscal intermediaries.

83. All documents relating to policies, procedures or practices of HHS, HHS Central and Regional Offices, HCFA/CMS or OIG, regarding the preservation or destruction of documents relating to Medicare's or Medicaid's method of reimbursement for prescription drugs.

84. Documents sufficient to identify all efforts made by HHS, HHS Central and Regional Offices, HCFA/CMS or OIG to preserve documents relating to Medicare's or Medicaid's method of reimbursement for drugs.

85. Documents sufficient to identify any document responsive to this subpoena that has been deleted, discarded or destroyed.

86. Documents sufficient to describe the manner in which HHS electronic documents, including e-mails, are preserved or deleted, discarded or destroyed.

CHI99 4191096-1.023560.0042

# **EXHIBIT T**

Robey 30(b)(6), Victoria HIGHLY CONFIDENTIAL  
Baltimore, MD

March 20, 2007

Page 1

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

-----X

IN RE: PHARMACEUTICAL : MDL NO. 1456  
INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION:  
PRICE LITIGATION : 01-CV-12257-PBS  
THIS DOCUMENT RELATES TO :  
U.S. ex rel. Ven-A-Care of : Judge Patti B. Saris  
the Florida Keys, Inc. v. :  
Abbott Laboratories, Inc., : Chief Magistrate  
No. 06-CV-11337-PBS : Judge Marianne B.  
: Bowler

-----X

HIGHLY CONFIDENTIAL

Tuesday, March 20, 2007

The video 30(b)(6) deposition of VICTORIA ROBEY,  
called for oral examination by Counsel for the  
Defendant Abbott Laboratories, Inc., pursuant to  
notice, held in the law offices of Hogan &  
Hartson, 111 South Calvert Street, Baltimore,  
Maryland 21202, beginning at 9:20 a.m., before

Henderson Legal Services  
(202) 220-4158

Robey 30(b)(6), Victoria HIGHLY CONFIDENTIAL  
Baltimore, MD

March 20, 2007

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1 on behalf of all of CMS with respect to this.

2 MR. COOK: Oh, sure.

3 BY MR. COOK:

4 Q Oh, sure. We're not asking you what  
5 you've done to gather documents. I'm not asking  
6 for CMS to testify about what you, Vicky Robey,  
7 did to preserve the documents.

8 MS. MARTINEZ: No, no. What I mean  
9 is that you were not asking -- since this is a  
10 30(b)(6) depo, I just want to be clear on the  
11 record that that was not the answer on behalf of  
12 CMS.

13 BY MR. COOK:

14 Q Correct. That question and answer,  
15 you were testifying as Vicky Robey, not as the  
16 designee of the 30(b)(6). I should have made  
17 that clear.

18 Back into character, though -- do we  
19 have a copy of the complaint?

20 MR. GABEL: The original?

21 MR. COOK: Yes.

22 BY MR. COOK:

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1 Q I'd like to show you real quickly --  
2 we'll set those aside and come back it -- a copy,  
3 I'll mark it as Exhibit Abbott 070.

4 (Exhibit Abbott 070,  
5 document entitled Original  
6 Complaint, was marked for  
7 identification.)

8 MS. MARTINEZ: Could I see it before  
9 you --

10 MR. COOK: Oh, absolutely. It is a  
11 copy of -- that one is thicker because it is two  
12 of them. It is a copy of the original complaint  
13 filed by Ven-a-Care. It indicates on the cover  
14 sheet that Ven-a-Care put on the document  
15 Original Complaint filed on about June 23, 1996.  
16 I believe that's incorrect for the record, that  
17 it is 1995, inasmuch as the civil case number is  
18 a '95 case number.

19 MS. MARTINEZ: Do you have an extra  
20 copy that counsel for Ven-a-Care could use?

21 MR. COOK: Absolutely. Absolutely.

22 MS. THOMAS: Thank you.

1 MR. COOK: Does anybody else need a  
2 copy? I would love to get rid of them so I don't  
3 have to carry them back.

4 BY MR. COOK:

5 Q If you could just take a quick  
6 moment, I realize that's a lengthy document but  
7 take a look at it and tell me whether you've ever  
8 seen that document before?

9 MS. THOMAS: You might want to  
10 clarify whether you mean, whether she's ever seen  
11 this document that may or may not have had these  
12 redactions.

13 MR. COOK: Okay.

14 THE WITNESS: No. I've never seen  
15 this before.

16 BY MR. COOK:

17 Q Either with or without the  
18 redactions?

19 A No.

20 Q And just for the record, on page 69,  
21 it indicates that it was served on June 23 of  
22 1995.

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1 To the best of your knowledge,  
2 Ms. Robey, did CMS institute any document  
3 preservation instruction in connection with this  
4 complaint that was filed on June 23, 1995?

5 A Not that I'm aware of.

6 Q Going back to the February 19, 2004  
7 memorandum included within Exhibit Abbott 069, are  
8 you aware of any subsequent memoranda that were  
9 issued relating to the litigation described in  
10 this February 19, 2004 memorandum regarding  
11 preservation of documents?

12 A There was one after this in January  
13 of 2007, I believe.

14 Q And what did that one -- again, is  
15 that a privileged communication?

16 MS. MARTINEZ: Objection to the  
17 extent it calls for privileged communication.  
18 You may be able to ask her if she has information  
19 from anybody who is a nonlawyer regarding that.

20 BY MR. COOK:

21 Q Just sticking with the memorandum and  
22 then moving on to information from a nonlawyer,

20 (Pages 74 to 77)

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<p>1 do you remember from whom the January 2007 2 memorandum was from?</p> <p>3 A It was from our program area -- I'm 4 trying to remember the lady's name, Mary Beth -- 5 Mary Beth Jason, I think. I'm not sure about the 6 last name.</p> <p>7 Q Is she an attorney?</p> <p>8 A No.</p> <p>9 Q Without describing the contents of 10 the memorandum, can you describe generally what 11 the nature of the document was?</p> <p>12 MS. THOMAS: Objection.</p> <p>13 MS. MARTINEZ: If you would focus 14 your question with respect, if she has any 15 information from a nonlawyer regarding whether or 16 not that document instructed anyone to preserve, 17 you might be able to get an answer that is 18 helpful.</p> <p>19 BY MR. COOK:</p> <p>20 Q Do you have any information from a 21 nonlawyer that would indicate whether that 22 document was intended to preserve documents</p>	<p>1 conversation?</p> <p>2 A It was with regard to preservation -- 3 not preservation but what the agency's policy was 4 on retention and the appropriate way to word 5 records management language in notice about 6 preservation.</p> <p>7 Q So, she called with a question?</p> <p>8 A Yes.</p> <p>9 Q And you answered her question?</p> <p>10 A Yes.</p> <p>11 Q A long conversation? Short 12 conversation?</p> <p>13 A I can't remember. It was before the 14 holidays.</p> <p>15 Q But she called to ask you about how 16 one would go about drafting a document 17 preservation or a hold memorandum?</p> <p>18 A She wanted records management 19 language to use. She didn't -- I did not -- I -- 20 I didn't give her content. I just talked with 21 her and gave her instructions.</p> <p>22 Q And what was your understanding about</p>
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<p>1 relating to litigation?</p> <p>2 A Yes, I do.</p> <p>3 Q From whom do you have that 4 information?</p> <p>5 A It is from Mary Beth, I think the 6 last name is Jason.</p> <p>7 Q She was the author of the memorandum?</p> <p>8 A I believe so, yes.</p> <p>9 Q Is this a conversation you had with 10 Ms. Jason?</p> <p>11 A A conversation as well as a copy of 12 the correspondence.</p> <p>13 Q Do you remember when and where this 14 conversation took place, approximately?</p> <p>15 A I talked with her yesterday as well 16 as in the past where she contacted me regarding 17 the agency's policy on retention.</p> <p>18 Q As best you can recall, what did you 19 say to Ms. Jason, what did she say to you in the 20 earlier conversations?</p> <p>21 A I can't remember.</p> <p>22 Q Do you remember the nature of the</p>	<p>1 why she was asking this question of you?</p> <p>2 A Because she was going to be preparing 3 correspondence that was being released about 4 preservation.</p> <p>5 Q Do you know why she was going to send 6 out correspondence relating to preservation at 7 that time?</p> <p>8 A She did not go into that with me.</p> <p>9 Q You say just before the holidays. 10 This would have been December of '96?</p> <p>11 MS. THOMAS: Objection.</p> <p>12 THE WITNESS: Oh, I'm talking -- no.</p> <p>13 BY MR. COOK:</p> <p>14 Q You said January of 2007. That's why 15 I had my dates off. About when was this 16 conversation, I should ask you?</p> <p>17 A It was before the holidays in 2006.</p> <p>18 Q Okay. So, before the Christmas 19 holidays of 2006?</p> <p>20 A I believe, yes.</p> <p>21 Q So, it would have been November, 22 December of 2006?</p>

21 (Pages 78 to 81)

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<p>1 A I can't remember.</p> <p>2 Q But within the last five months, six</p> <p>3 months?</p> <p>4 A Maybe.</p> <p>5 Q Okay. I just wanted to make sure I</p> <p>6 had the right year, that I wasn't off by 12</p> <p>7 months.</p> <p>8 A You just said '96 before that.</p> <p>9 Q Right. So, before the holidays,</p> <p>10 December of --</p> <p>11 A But you said 1996.</p> <p>12 Q I'm so old that '96 and 2006 seem</p> <p>13 like the same year. I apologize. I didn't even</p> <p>14 understand it when you told me I had it wrong.</p> <p>15 So, 2006.</p> <p>16 A Okay.</p> <p>17 Q Within the last half a year?</p> <p>18 A (Witness nods head.)</p> <p>19 Q Is there any way you would figure out</p> <p>20 when that conversation took place?</p> <p>21 A No.</p> <p>22 Q As the records management officer for</p>	<p>1 specifically to a particular litigation?</p> <p>2 A Yes.</p> <p>3 Q Prior to that memorandum being</p> <p>4 distributed, without revealing the contents of</p> <p>5 that of that memorandum, had there ever been any</p> <p>6 prior communications within CMS relating to</p> <p>7 document preservations in connection to that</p> <p>8 case?</p> <p>9 MS. MARTINEZ: Objection to the</p> <p>10 extent that she knows.</p> <p>11 MR. COOK: Sure.</p> <p>12 BY MR. COOK:</p> <p>13 Q To the extent that you are aware of</p> <p>14 as the records officer for CMS, had there ever</p> <p>15 been any prior records preservation directions</p> <p>16 issued relating to that case that was the subject</p> <p>17 of Mary Beth's memorandum?</p> <p>18 A Yes.</p> <p>19 Q When was that?</p> <p>20 A Early 2003, late 2004.</p> <p>21 Q So, it is your understanding that</p> <p>22 those two cases were somehow connected?</p>
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<p>1 the CMS home office had -- let me strike that and</p> <p>2 step one step back. Do you know what litigation</p> <p>3 she was asking in connection with?</p> <p>4 A I can't remember. I get hundreds of</p> <p>5 calls.</p> <p>6 Q The case about which Ms. Jason --</p> <p>7 A Mary Beth, I think the last name is</p> <p>8 Jason. The first name is Mary Beth.</p> <p>9 Q The case about which Mary Beth</p> <p>10 contacted you before the holidays in 2006, was</p> <p>11 that a case about which anybody, to your memory,</p> <p>12 had contacted you before?</p> <p>13 MS. THOMAS: Objection.</p> <p>14 THE WITNESS: I can't remember.</p> <p>15 BY MR. COOK:</p> <p>16 Q And without revealing any of the</p> <p>17 substance of it, did a memorandum subsequently</p> <p>18 come out from Mary Beth?</p> <p>19 A Yes.</p> <p>20 Q To whom was it addressed?</p> <p>21 A I can't remember.</p> <p>22 Q Did it describe -- did it relate</p>	<p>1 A Yes.</p> <p>2 Q The same case or connected?</p> <p>3 A I just associated it because of</p> <p>4 information that was provided in the subject</p> <p>5 line.</p> <p>6 Q Okay.</p> <p>7 A I'm not an expert on that.</p> <p>8 Q And I understand completely. Other</p> <p>9 than the 2003-2004 prior preservation memo, and</p> <p>10 that's the one we have here at pages 5 through 7,</p> <p>11 correct -- yes, 5 through 7.</p> <p>12 A Yes.</p> <p>13 Q Other than that February 19, 2004</p> <p>14 communication, had there ever, before that, been</p> <p>15 any preservation instructions issued in</p> <p>16 connection with that case?</p> <p>17 A Not that I'm --</p> <p>18 MS. THOMAS: Objection.</p> <p>19 THE WITNESS: Not that I'm aware of.</p> <p>20 THE REPORTER: Counsel, is this a</p> <p>21 good time to take a recess?</p> <p>22 MR. COOK: I'd be happy to. Thank</p>

22 (Pages 82 to 85)

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<p>1 destroyed. So, many years after.</p> <p>2 Q So, there's some time limit and the</p> <p>3 question is whether that time goes back to before</p> <p>4 1998?</p> <p>5 A Yes.</p> <p>6 Q When a particular box is subject to a</p> <p>7 litigation hold, how do you apply that litigation</p> <p>8 hold to the warehouse?</p> <p>9 MS. MARTINEZ: Objection to form.</p> <p>10 You are assuming that a box from a litigation</p> <p>11 hold would be in that location.</p> <p>12 BY MR. COOK:</p> <p>13 Q Good point. Is it possible that a</p> <p>14 box in your warehouse or a document in your</p> <p>15 warehouse could be subject to a litigation hold?</p> <p>16 A Yes.</p> <p>17 Q Has that happened?</p> <p>18 A Yes.</p> <p>19 Q When it happens, what do you do?</p> <p>20 MS. MARTINEZ: Objection to form.</p> <p>21 When what happens, she does what?</p> <p>22 BY MR. COOK:</p>	<p>1 you?</p> <p>2 A Verbally, e-mail.</p> <p>3 Q Do you keep a record of those</p> <p>4 communications?</p> <p>5 A The e-mails, I would. Verbal</p> <p>6 communications, I don't.</p> <p>7 Q Once you receive a verbal, e-mail or</p> <p>8 written communication of this sort, what do you</p> <p>9 then do?</p> <p>10 A I go into my database and I mark that</p> <p>11 the records are frozen. Because the way my</p> <p>12 database is set up, I have to assign a disposal</p> <p>13 date. So, I mark it out like ten years from the</p> <p>14 date that the disposal date originally was. That</p> <p>15 way, in ten years, if that -- if it happens to</p> <p>16 come up and the case is still active or the</p> <p>17 records are still frozen, then a notice would be</p> <p>18 generated again to the record owner, telling them</p> <p>19 it's come time or because of the freeze, can we</p> <p>20 lift the freeze or do we -- can we dispose of</p> <p>21 them.</p> <p>22 Q In connection with the -- can you</p>
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<p>1 Q How do you determine whether a</p> <p>2 particular box or document in your house is</p> <p>3 subject to a litigation hold?</p> <p>4 A The record owner --</p> <p>5 MS. THOMAS: Objection.</p> <p>6 THE WITNESS: The record owner</p> <p>7 notifies me.</p> <p>8 BY MR. COOK:</p> <p>9 Q Do you do -- in the absence of an</p> <p>10 affirmative communication from the records owner,</p> <p>11 do you do anything to preserve the document?</p> <p>12 MS. THOMAS: Objection.</p> <p>13 THE WITNESS: I mean if -- if --</p> <p>14 BY MR. COOK:</p> <p>15 Q Is there any way for you to know, you</p> <p>16 as the records officer to know that this box is</p> <p>17 subject to a litigation hold unless the record</p> <p>18 owner sends you a communication?</p> <p>19 A Correct, because I'm not a program --</p> <p>20 I am not a program area person. They are the</p> <p>21 experts. I'm not.</p> <p>22 Q How are those communications made to</p>	<p>1 hand me Exhibit Abbott 069? I don't remember the</p> <p>2 date. In connection with the February 19,</p> <p>3 2004 record hold memorandum that we looked at</p> <p>4 before as part of Exhibit Abbott 069, this was the</p> <p>5 memorandum from Jacquelyn White, if you'll recall</p> <p>6 --</p> <p>7 A Okay.</p> <p>8 Q Did you place a hold on any documents</p> <p>9 in the CMS warehouse?</p> <p>10 A No, I did not.</p> <p>11 Q In connection with the January 2007</p> <p>12 memorandum that was issued following your</p> <p>13 discussion with Mary Beth Jason, did you place a</p> <p>14 hold on any documents in the CMS warehouse?</p> <p>15 A No.</p> <p>16 MS. MARTINEZ: I just want to</p> <p>17 clarify, if you are trying to ask whether she</p> <p>18 recalls whether any owner sent her any kind of</p> <p>19 notice like that, is that what you are asking or</p> <p>20 whether she personally did?</p> <p>21 MR. COOK: I am asking whether the</p> <p>22 records officer placed a hold on any documents.</p>

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<p>1 MS. MARTINEZ: That she recalls.</p> <p>2 THE WITNESS: And it would be hard</p> <p>3 for me to do that because a lot of times in the</p> <p>4 subject line they give me, there may not be the</p> <p>5 description that I need to be able to apply</p> <p>6 something.</p> <p>7 Q I may not have been clear. Following</p> <p>8 the September 2004 memorandum in Exhibit Abbott</p> <p>9 069, that's the Jacquelyn White memorandum on</p> <p>10 February 19, 2004, did you receive any</p> <p>11 instructions from CMS employees to place holds on</p> <p>12 documents in the CMS warehouse?</p> <p>13 A No.</p> <p>14 Q And so is there anybody else that</p> <p>15 would have input of records holds into the CMS</p> <p>16 database that you described other than you?</p> <p>17 A I have a person who is my backup but</p> <p>18 that's only -- she only goes into the system to</p> <p>19 generate accession numbers or to do the disposal</p> <p>20 process.</p> <p>21 Q And so to the best of your knowledge,</p> <p>22 were any documents in the CMS warehouse held and</p>	<p>1 memorandum, sent back to the record owner and you</p> <p>2 simply facilitated the delivery of the box?</p> <p>3 A Correct.</p> <p>4 Q Without knowing the reason?</p> <p>5 A Yes.</p> <p>6 Q Was there an increase in the number</p> <p>7 of requests following the September 2004 memo, if</p> <p>8 you recall?</p> <p>9 A I don't know.</p> <p>10 Q Do you know of any specific requests</p> <p>11 that actually did relate to the September 2004</p> <p>12 memorandum and collection effort that followed</p> <p>13 it?</p> <p>14 A No.</p> <p>15 Q When someone requests a box back from</p> <p>16 the warehouse and removes documents from it,</p> <p>17 sends it back to the warehouse, is any notation</p> <p>18 made of the fact the documents were removed from</p> <p>19 the box?</p> <p>20 MS. MARTINEZ: Objection to form.</p> <p>21 THE WITNESS: If they tell me that</p> <p>22 they're taking something out, I will then go back</p>
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<p>1 preserved from destruction as a result of the</p> <p>2 February 19, 2004 memorandum from Jacquelyn</p> <p>3 White?</p> <p>4 MS. MARTINEZ: Objection to form.</p> <p>5 MS. THOMAS: Objection.</p> <p>6 THE WITNESS: Not that I'm aware of.</p> <p>7 BY MR. COOK:</p> <p>8 Q Would you know whether documents were</p> <p>9 collected from the CMS warehouse following the</p> <p>10 February 19, 2004 memorandum from Jacquelyn</p> <p>11 White?</p> <p>12 MS. MARTINEZ: Objection to form.</p> <p>13 MS. THOMAS: Objection.</p> <p>14 THE WITNESS: When boxes are</p> <p>15 requested from the warehouse, they don't give me</p> <p>16 the reason. They're the record owners. They</p> <p>17 need the boxes back to be able to access their</p> <p>18 information and files. They don't give me a</p> <p>19 reason why.</p> <p>20 BY MR. COOK:</p> <p>21 Q So, it could be that boxes were</p> <p>22 requested from the warehouse as a result of this</p>	<p>1 to my copy of the transmittal sheet or inventory</p> <p>2 and make a notation.</p> <p>3 Q It's always a big if. So, if policy</p> <p>4 is followed, there would be a notation on the</p> <p>5 index that some files were removed before the box</p> <p>6 was returned to the warehouse?</p> <p>7 MS. THOMAS: Objection.</p> <p>8 THE WITNESS: Yes.</p> <p>9 BY MR. COOK:</p> <p>10 Q But obviously, people don't always</p> <p>11 follow policy so there is no way to tell.</p> <p>12 A I have no --</p> <p>13 MS. MARTINEZ: Objection to form.</p> <p>14 BY MR. COOK:</p> <p>15 Q You didn't independently verify it</p> <p>16 because you don't go through the box --</p> <p>17 A Absolutely --</p> <p>18 Q -- to make sure that it matches up to</p> <p>19 the index?</p> <p>20 A No.</p> <p>21 Q With respect to the January 2007,</p> <p>22 just so we're clear, are you aware of any</p>

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<p>1 litigation hold being placed on any boxes in the 2 warehouse as a result of the January 2007 memo 3 from Mary Beth Jason?</p> <p>4 A No.</p> <p>5 Q Are any boxes in the warehouse 6 currently subject to a litigation hold?</p> <p>7 MS. THOMAS: Objection.</p> <p>8 THE WITNESS: Yes, MSP.</p> <p>9 BY MR. COOK:</p> <p>10 Q Other than MSP, are there any 11 litigation holds currently in place in the 12 warehouse?</p> <p>13 MS. THOMAS: Objection.</p> <p>14 THE WITNESS: There may be. I won't 15 -- don't know without looking at my records.</p> <p>16 BY MR. COOK:</p> <p>17 Q But not that you remember right now?</p> <p>18 A No.</p> <p>19 Q I'd like to turn to the Federal 20 Records Center.</p> <p>21 A Okay.</p> <p>22 Q What is the manual process of sending</p>	<p>1 as the disposal date and then attached to that is 2 the box inventory.</p> <p>3 Q If that box -- if you or someone at 4 CMS want to retrieve that box, how would you go 5 about doing it?</p> <p>6 A Electronically, I am hooked into a 7 server where I can order the boxes. They process 8 it within 24 hours, and the Records Center 9 receives the request, pulls the box, and then 10 ships it to me.</p> <p>11 Q Are you -- do you have access to a 12 record of all boxes sent to the Federal Records 13 Center by CMS and all boxes retrieved from the 14 Federal Records Center at CMS?</p> <p>15 A I have -- not retrieved. I have a 16 record of everything that is at the Federal 17 Records Center. I'm sorry. I'm wrong. I have 18 my -- I keep an internal log of records that have 19 been requested from the Records Center and then 20 returned.</p> <p>21 Q Okay. So, you have your own traffic 22 log of what went out, what came back, what went</p>
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<p>1 records to the Federal Records Center?</p> <p>2 A The record owner has eligible records 3 in accordance with the record schedule that they 4 want to send to storage that are no longer active 5 files. They request the storage boxes from me. 6 I provide them the boxes. They box up their 7 files. They do an inventory of what is in each 8 box. They prepare a record transmittal receipt 9 for that to me electronically. I send that to 10 the Records Center for approval.</p> <p>11 Once they send back an approved copy 12 of the transmittal sheet, I put that in box 13 number one and then the records are sent to the 14 Federal Records Center.</p> <p>15 Q What information is sent to the 16 Federal Records Center along with the physical 17 box of documents?</p> <p>18 A The records transmittal receipt which 19 provides contact information, who the record 20 owner is, our agency information, the accession 21 number, the number of boxes that are being sent, 22 a description, the disposition authority, as well</p>	<p>1 back?</p> <p>2 A Yes.</p> <p>3 Q And similar to -- step back a 4 minute -- the warehouse, do you keep a similar 5 log of retrieval requests and returns for the CMS 6 warehouse?</p> <p>7 A It's maintained in the database.</p> <p>8 Q It is? Okay. So, if I have a line 9 with accession box number one from Louie Gabel, 10 disposition date, given to me on stuff and such a 11 date, retrieved on another date and returned back 12 to me on the following date?</p> <p>13 A That information is available but 14 it's not in one report. You would have to go 15 into several different screens to get it.</p> <p>16 Q Okay. At the Federal Records Center, 17 do you know if the Federal Records Center keeps 18 also a log of comings and goings of the boxes for 19 which it maintains custody?</p> <p>20 A I don't know.</p> <p>21 Q Do you have any way of knowing what 22 happens to a box at the Federal Records Center</p>

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# **EXHIBIT U**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CHAIN DRUG STORES *et al.* )  
Plaintiffs, )  
v. )  
MICHAEL O. LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES *et al.*, )  
Defendants. )  
 ) Civil Action No. 1:07cv02017 (RCL)

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**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR EXPEDITED HEARING**

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their AMP data pursuant to that former system, by requiring CMS to publish AMPs calculated in an inconsistent manner, and by requiring CMS to calculate and apply federal payment limits using these unreliable data. These harms substantially outweigh the harms Plaintiffs have asserted, which are undermined in any event by their own unreasonable delay.

For these reasons, this Court should deny Plaintiffs' request for a preliminary injunction.

### **BACKGROUND**

#### **I. THE MEDICAID PAYMENT FRAMEWORK PRIOR TO THE DEFICIT REDUCTION ACT OF 2005**

Established by the Social Security Act of 1965, Medicaid is a federal/state cooperative program designed to furnish medical assistance to persons “whose income and resources are insufficient to meet the costs of necessary medical services.” 42 U.S.C. § 1396. The program is administered by the states but jointly financed by the federal and state governments. *See id.* Each state is required to establish a medical assistance plan (known as the “State Plan”) that is approved by CMS and which describes, *inter alia*, eligibility standards, the scope of benefits, and payment methodologies of that state’s Medicaid program. *Id.* § 1396a(a). CMS reviews the various State Plans and subsequent plan amendments to ensure compliance with federal requirements. *See id.* §§ 1396a(b), 1396c. For example, the states’ payment levels must be “sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.” *Id.* § 1396a(a)(30)(A). States – not the federal government – set the rate at which they pay pharmacies and other healthcare providers for Medicaid-covered products and services, and the federal government provides federal financial participation (FFP) to states to cover a portion of those costs. *Id.* § 1396b.

Most states currently pay pharmacies for prescription drugs at the lower of estimated acquisition cost (EAC) plus a dispensing fee or the pharmacy’s usual and customary charge to the

will do so with full knowledge of the criteria that, at CMS's direction, manufacturers now use to compute those AMPs.

Finally, and perhaps most importantly, Plaintiffs argue that they will be harmed monetarily by the implementation of the AMP rule. *See* Pls.' PI Memo. at 38-40. If Plaintiffs are correct, however, the additional money afforded them with this preliminary injunction will come at the expense of the Medicaid program itself. The injunction would simply reallocate money from the Medicaid program to Plaintiffs, and the Medicaid program will be equally unable to recover its costs. States have long been confronting budget crises leading them to consider cutbacks in their Medicaid programs. *See, e.g.*, *Pharm. Research & Mfrs. Ass'n of Am. v. Thompson*, 259 F. Supp. 2d 39, 84 (D.D.C. 2003) ("Michigan . . . is facing a budget crisis and possible cut-backs in its budget for Medicaid and other health care services."); *see also* H.R. Rep. No. 109-276 (Nov. 7, 2005) ("Unreformed, analysts predict Medicaid will bankrupt every state in as little as 20 years absorbing 80 [to] 100% of all state dollars."). If this injunction saves Plaintiffs substantial sums of money, as they claim, it would do so at the expense of an already-struggling Medicaid system and, ultimately, its beneficiaries.

Because Plaintiffs assert only monetary harm, because the taxpaying public would suffer at least the same harm, and because Medicaid beneficiaries could suffer an even greater harm, the balance of harms tips decidedly against Plaintiffs.

## **CONCLUSION**

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

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s/ Wendy M. Ertmer

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Dated: December 6, 2007

# **EXHIBIT V**

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December 10, 2008

Little Rock, A

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

-----x

In re: PHARMACEUTICAL INDUSTRY )

AVERAGE WHOLESALE PRICE )

LITIGATION )

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United States of America ex rel.) MDL No. 1456

Ven-A-Care of the Florida Keys, )

Inc. v. Abbott Laboratories, ) Civil Action

Inc., Civil Action No. 06- ) No. 01-12257-PBS

11337-PBS; and United States of )

America ex rel. Ven-A-Care of ) Honorable

the Florida Keys, Inc., v. Dey, ) Patti B. Saris

Inc., et al., Civil Action No. )

05-11084-PBS; and United States )

of America ex rel. Ven-A-Care )

of the Florida Keys, Inc., v. )

Boehringer Ingelheim Corp., et )

al., Civil Action No. 07-10248- )

PBS )

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<p>1 referring -- what I'm trying to understand from  2 this, if they're referring strictly to brand,  3 generic or both. Can we tell? I mean ,it's what  4 the -- the statement says.</p> <p>5 Q. Well, for some drugs that were subject  6 to a MAC Myers and Stauffer found that they were  7 acquired at rates of AWP minus 90 percent?</p> <p>8 MS. OBEREMBT: Objection.</p> <p>9 A. I'm not following you. I'm sorry.</p> <p>10 Q. (By Mr. Reale) Okay.</p> <p>11 A. I'm just not following you at all.</p> <p>12 Q. Let me break up my question a little  13 bit. The last -- second to last sentence in this  14 paragraph states, "The acquisition cost of drugs  15 purchased direct as a percent of AWP ranged from  16 80 to 84.6 percent for non-MAC drugs and 9.5  17 percent to 80 percent for MAC drugs." Do you see  18 that language?</p> <p>19 A. I see that language.</p> <p>20 Q. Now, Myers and Stauffer is reporting  21 that for some MAC drugs, pharmacies would acquire  22 them at rates of AWP minus 90 percent; isn't that</p>	<p>1 Q. If you would, could you turn to Exhibit  2 22, which is entitled "Drugs Included in the  3 Estimated Acquisition Cost Study"?</p> <p>4 A. Sure.</p> <p>5 Q. And it looks like this.</p> <p>6 A. Okay. Got it.</p> <p>7 Q. Now, I want you please to turn to the  8 third page within Exhibit 22. And it begins with  9 Effexor, if I'm saying that right, at the top?</p> <p>10 A. Close.</p> <p>11 Q. How do you pronounce that?</p> <p>12 A. Effexor.</p> <p>13 Q. Effexor. Do you see about a quarter of  14 the way down there's a reference to the  15 Furosemide 40-milligram tablet?</p> <p>16 A. I see it listed, yes.</p> <p>17 Q. And the NDC number for this drug is  18 00054429931. Do you see that?</p> <p>19 A. I do.</p> <p>20 Q. Do you know if Furosemide 40-milligram  21 tablet is subject to a State MAC or FUL?</p> <p>22 A. I assume it is. I don't really know</p>
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<p>1 correct?</p> <p>2 A. Based on the 9.5 percent?</p> <p>3 Q. Yes.</p> <p>4 A. How do I answer this?</p> <p>5 Q. Yes or no.</p> <p>6 A. They -- well, 9.5 to 80 percent, but  7 what my -- what you're not -- what's not being  8 stated, they're not saying where our MAC fit in  9 there, because you had asked me earlier what  10 percent was our MAC off of AWP, and I have no  11 idea. So they're just -- that's just a statement  12 saying that that can occur. It's not --</p> <p>13 Q. Right. And the statement that it can  14 occur is that some drugs can be purchased by  15 pharmacies at rates of AWP minus 90 percent;  16 that's correct?</p> <p>17 A. That's a true statement.</p> <p>18 Q. And that was information that was  19 provided by Myers and Stauffer to Arkansas  20 Medicaid? Yes?</p> <p>21 A. Anywhere from 9.5 to off -- 80 percent  22 off of AWP.</p>	<p>1 for a fact. I'd have to have the list in front  2 of me to answer it completely accurately.</p> <p>3 Q. But the Furosemide 40-milligram tablet  4 with the NDC number I just referenced was one of  5 the drugs included in the estimated acquisition  6 cost study, correct?</p> <p>7 A. According to what Myers and Stauffer  8 put here, yes.</p> <p>9 Q. Now, turn, if you would for me, to  10 Exhibit 26, Page 1. This is entitled "Arkansas  11 Pharmacies' Totals and Means for Non-MAC Drugs  12 Acquisition Cost As a Percent of AWP". Do you  13 understand what that means, acquisition cost as a  14 percent of AWP?</p> <p>15 A. I understand acquisition cost is a  16 percent of AWP. But not being a statistical or  17 an analytical person, the mean and the medians  18 are not things that are real clear to me, so I  19 understand what acquisition cost as a percent of  20 AWP means.</p> <p>21 Q. So if we look at provider vendor number  22 in the left column --</p>

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December 11, 2008

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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In re: PHARMACEUTICAL INDUSTRY )

AVERAGE WHOLESALE PRICE )

LITIGATION )

----- )

United States of America ex rel.) MDL No. 1456

Ven-A-Care of the Florida Keys, )

Inc. v. Abbott Laboratories, ) Civil Action

Inc., Civil Action No. 06- ) No. 01-12257-PBS

11337-PBS; and United States of )

America ex rel. Ven-A-Care of ) Honorable

the Florida Keys, Inc., v. Dey, ) Patti B. Saris

Inc., et al., Civil Action No. )

05-11084-PBS; and United States )

of America ex rel. Ven-A-Care )

of the Florida Keys, Inc., v. )

Boehringer Ingelheim Corp., et )

al., Civil Action No. 07-10248- )

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December 11, 2008

## Little Rock, A

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4	produced, sworn, and examined on the 11th day of		
5	December, 2008, between the hours of nine o'clock		
6	in the forenoon and six o'clock in the evening of		
7	that day, at the offices of United States Attorneys'		
8	Office, 425 West Capitol, Suite 500, Metropolitan		
9	Building, Little Rock, Arkansas, before BRENDA		
10	ORSBORN, a Certified Court Reporter within and for		
11	the State of Missouri, in a certain cause now		
12	pending before the United States District Court,		
13	District of Massachusetts, In re: Pharmaceutical		
14	Industry Average Wholesale Price litigation.		
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December 11, 2008

## Little Rock, A

<p style="text-align: right;">Page 357</p> <p>1 OIG's 1984 report that discussed the acquisition 2 cost of pharmacies in Arkansas. Do you recall 3 that?</p> <p>4 A. I recall looking at a lot of documents 5 yesterday. I can't say that I specifically 6 remember that particular one, but I know we 7 looked at a lot of documents referring to 8 acquisition costs yesterday.</p> <p>9 Q. Well, just so that you don't have to 10 take my word for it, let's pull that out so you 11 can see what I'm referring to. This was -- I 12 believe was Roxane Exhibit 9. Is that the 13 number you have?</p> <p>14 A. Yes.</p> <p>15 Q. Right. And we examined Roxane Exhibit 16 9 yesterday --</p> <p>17 A. Okay. We did.</p> <p>18 Q. -- which was the report that talked 19 about the acquisition costs of pharmacies in 20 Arkansas, among other states, do you recall that?</p> <p>21 A. I do.</p> <p>22 Q. And we looked at the various ranges of</p>	<p style="text-align: right;">Page 359</p> <p>1 typically greater than the discounts when 2 purchasing branded drug?</p> <p>3 MS. OBEREMBT: Objection.</p> <p>4 A. I can only make that assumption based 5 on the survey findings. The survey findings 6 generally show that -- and I'd have to look at 7 the survey again, that the variance on brand is 8 not as great on the variance on generics. I 9 mean, that's common knowledge. I'd guess you'd 10 say.</p> <p>11 MR. REALE: Let me mark the next one.</p> <p>12 A. A common assumption. Excuse me. Let 13 me rephrase that.</p> <p>14 [Marked Exhibit Roxane 020]</p> <p>15 Q. (By Mr. Reale) Roxane Exhibit 20 has 16 just been passed out. This is Bates Page 17 HHC011-2260 to 2268. And this is a letter from 18 the Arkansas Department of Human Services, and it 19 appears to be dated June 22nd, 1988, and it's 20 from Kenny Whitlock, Director at DHS, to Don 21 Hearn at HCFA in the regional office at Dallas, 22 Texas. This was another document, Ms. Bridges,</p>
<p style="text-align: right;">Page 358</p> <p>1 acquisition costs for pharmacies in Arkansas on 2 Page 9.</p> <p>3 A. Uh-huh. Correct.</p> <p>4 Q. So now back to Roxane Exhibit 19. 5 This letter in March of 1988, the -- HCFA's 6 regional office states that the average 7 difference between AWP and what pharmacists 8 generally paid in Arkansas and Texas was 12.53 9 percent below AWP. Do you agree that this 10 document reflects that?</p> <p>11 A. Generally, it was 12.53, not on all 12 drugs. I will agree that the document says that.</p> <p>13 Q. And, in fact, that the document says 14 that the survey performed by Dallas regional 15 office excluded antibiotic drugs, generic drugs 16 and drugs that were purchased directly from the 17 manufacturer?</p> <p>18 A. So this would be strictly for brand 19 name drugs. This would not include any generics.</p> <p>20 Q. And based on what we've seen, you would 21 expect that the discounts available for 22 pharmacies, when purchasing generic drugs, are</p>	<p style="text-align: right;">Page 360</p> <p>1 that was produced to us by the Federal Government 2 in this lawsuit. And if you look at the first 3 paragraph of this letter, it's a response from 4 Arkansas to concerns raised by HCFA. Do you 5 agree with that?</p> <p>6 A. It's a clarification or a modification, 7 according to this.</p> <p>8 Q. And it has been your experience, hasn't 9 it, that when Arkansas has submitted Plan 10 Amendments to CMS, from time to time they may ask 11 for additional information from the State, either 12 to support certain aspects of the Plan Amendment 13 or for other aspects.</p> <p>14 A. For a State Plan Amendment, they can 15 request additional information. Is this in 16 reference to a State Plan Amendment? I don't 17 know the -- I mean, I don't know if this is in 18 reference to a State Plan Amendment. Let me 19 rephrase that.</p> <p>20 Q. Now, if you would turn to the second 21 page of the cover letter, or excuse me, of the 22 letter. And at the top, there's something that</p>

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# **EXHIBIT W**

Gorospe, James Kevin

March 19, 2008

Sacramento, CA

Page 1

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL ) MDL NO. 1456  
INDUSTRY AVERAGE WHOLESALE ) CIVIL ACTION:  
PRICE LITIGATION ) 01-CV-12257-PBS

-----X  
THIS DOCUMENT RELATES TO: ) Judge Patti B. Saris  
U.S. ex rel. Ven-A-Care of )  
the Florida Keys, Inc. v. ) Magistrate Judge  
Abbott Laboratories, Inc., ) Marianne B. Bowler  
et al. )  
Case No. 06-CV-11337-PBS )

-----X  
--oOo--

WEDNESDAY, MARCH 19, 2008

--oOo--

VIDEOTAPED DEPOSITION OF

JAMES KEVIN GOROSPE

Reported By: JOANIE MURAKAMI, CSR No. 5199

Registered Merit Reporter

Certified Realtime Reporter

Gorospe, James Kevin

March 19, 2008

Sacramento, CA

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<p>1 issues; is that fair?</p> <p>2 A. That's fair.</p> <p>3 Q. Did you -- so I take it you recall</p> <p>4 reading this report when you took your first</p> <p>5 position in DHS?</p> <p>6 A. That's correct.</p> <p>7 Q. And this report, it's titled Report by</p> <p>8 the Auditor General of California. How Medi-Cal</p> <p>9 and Other Healthcare Providers Manage Their</p> <p>10 Pharmaceutical Expenditures, and it's dated</p> <p>11 August 1991 in the lower right-hand corner of the</p> <p>12 first page.</p> <p>13 A. Uh-huh.</p> <p>14 Q. This document, obviously, if you read</p> <p>15 it at DHS, it was sent to DHS at some point,</p> <p>16 correct?</p> <p>17 A. That is correct.</p> <p>18 Q. And if you go to the last two pages of</p> <p>19 the document, 71223 and 24, there's a letter from</p> <p>20 a woman named Molly Joel Coye, who's the director</p> <p>21 of DHS, to a gentleman named Kurt R. Sjoberg, S-</p> <p>22 J-O-B-E-R-G, dated August 22, 1991.</p>	<p>1 A. Yes, I do.</p> <p>2 Q. In reference to the first report, the</p> <p>3 January 1990 report, the California Auditor</p> <p>4 General is noting that the United States Senate</p> <p>5 report in January of 1990 concluded that federal</p> <p>6 and state governments pay higher prescription</p> <p>7 drug prices through their Medicaid programs than</p> <p>8 any other major purchasers of prescription drugs,</p> <p>9 correct?</p> <p>10 A. That's the statement made.</p> <p>11 Q. And then in reference to the August</p> <p>12 1989 report, which we've already looked at today,</p> <p>13 the California Auditor General, again, is noting,</p> <p>14 in 1991, that the earlier Senate report -- let me</p> <p>15 start over.</p> <p>16 This document refers to the August 1989</p> <p>17 report from the US Senate which reported that</p> <p>18 organizations, such as the Department of Veterans</p> <p>19 Affairs, hospitals and HMOs, are negotiating</p> <p>20 prices directly with manufacturers at discounts</p> <p>21 of 41 to 99 percent off the published average</p> <p>22 wholesale price, correct?</p>
Page 211	Page 213
<p>1 Do you see that letter?</p> <p>2 A. Yes.</p> <p>3 Q. And reading this letter, Ms. Coye</p> <p>4 indicates that secretary Gould asked her to</p> <p>5 respond to the August 1991 draft report that</p> <p>6 appears earlier in the exhibit, correct?</p> <p>7 A. That is correct.</p> <p>8 Q. Okay. If you could look at page seven</p> <p>9 for me. It's Bate Stamped 71171. There's a</p> <p>10 section there called Utilization and Price</p> <p>11 Controls.</p> <p>12 A. I see it.</p> <p>13 Q. And that paragraph, it refers to two</p> <p>14 United States Senate reports.</p> <p>15 Do you see that? One is titled</p> <p>16 Skyrocketing Prescription Drug Prices: Turning a</p> <p>17 Bad Deal into a Fair Deal dated January of '90,</p> <p>18 and then about halfway down the paragraph, it</p> <p>19 refers to an August 1989 report, which we've</p> <p>20 already looked at today, titled Prescription Drug</p> <p>21 Prices: Are We Getting Our Money's Worth.</p> <p>22 Do you see that?</p>	<p>1 A. That's what it says, yes.</p> <p>2 Q. So DHS knew, no later than August of</p> <p>3 1991, that certain pharmaceutical purchasers</p> <p>4 received discounts of up to -- from anywhere from</p> <p>5 41 to 99 percent off of the published AWP,</p> <p>6 correct?</p> <p>7 MR. PAUL: Objection. Form. No</p> <p>8 foundation to DHS.</p> <p>9 MR. GOBENA: Same objection.</p> <p>10 THE WITNESS: I would assume anybody</p> <p>11 that read the report would have read this</p> <p>12 passage.</p> <p>13 BY MR. COLE:</p> <p>14 Q. Anyone who would have read the report</p> <p>15 would have learned this information at that time,</p> <p>16 correct?</p> <p>17 A. That is correct.</p> <p>18 Q. And is it your understanding, based on</p> <p>19 your experience at Medi-Cal, that if a draft</p> <p>20 report by the Auditor General was sent to a</p> <p>21 particular department, such as DHS, that people</p> <p>22 in DHS would read it and learn the information</p>

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Gorospe, James Kevin

March 19, 2008

Sacramento, CA

<p style="text-align: right;">Page 214</p> <p>1 contained in it?</p> <p>2 MR. PAUL: Objection. Form. No</p> <p>3 foundation.</p> <p>4 MR. GOBENA: Same objections.</p> <p>5 THE WITNESS: That is correct.</p> <p>6 BY MR. COLE:</p> <p>7 Q. Okay. In your time at Medi-Cal, if a</p> <p>8 report was sent to the pharmacy policy unit, you</p> <p>9 would have read it and considered the information</p> <p>10 contained in it, correct?</p> <p>11 A. That is correct.</p> <p>12 Q. Dr. Gorospe, if you could turn to Page</p> <p>13 31 in this document. It's Bate Stamped 71195.</p> <p>14 And just so you have a little bit of a frame of</p> <p>15 reference, you might want to look back at the</p> <p>16 prior two pages.</p> <p>17 Table four, that appears on Page 31, is</p> <p>18 part of a section called Variation in Amounts</p> <p>19 Pharmacies Bill and are Reimbursed, and that</p> <p>20 section starts on Page 29.</p> <p>21 And if you look at the second</p> <p>22 paragraph, it says: We surveyed six pharmacists</p>	<p style="text-align: right;">Page 216</p> <p>1 one generic product that six different pharmacies</p> <p>2 bought from various manufacturers; is that right?</p> <p>3 Take your time if you want to study it</p> <p>4 for a while. It certainly took me a long time.</p> <p>5 A. Under the heading of estimated</p> <p>6 acquisition costs, yes, it shows --</p> <p>7 Q. It has different columns?</p> <p>8 A. Different columns and different prices.</p> <p>9 Q. And the columns are -- well, at least</p> <p>10 the last four columns are components, or at one</p> <p>11 time, components of the reimbursement formula in</p> <p>12 California, right?</p> <p>13 A. That's correct.</p> <p>14 MR. PAUL: Objection. Form. No</p> <p>15 foundation, if I can get that in before he</p> <p>16 answered.</p> <p>17 MR. COLE: Sure.</p> <p>18 Q. You see this first column after the</p> <p>19 manufacturer column, it says "amount pharmacy</p> <p>20 would have charged Medi-Cal"?</p> <p>21 A. Yes, I see that.</p> <p>22 Q. Do you know what that means?</p>
<p style="text-align: right;">Page 215</p> <p>1 who obtained the amount their pharmacy would</p> <p>2 charge Medi-Cal for a sample of six multiple</p> <p>3 source prescription drugs, and multiple source is</p> <p>4 another word for generic drugs; is that fair?</p> <p>5 A. That is correct.</p> <p>6 Q. Goes on to say: We then compared the</p> <p>7 amounts that these pharmacies would charge to</p> <p>8 Medi-Cal with the amounts for Medi-Cal</p> <p>9 reimbursement limits to determine whether a</p> <p>10 significant difference existed between the amount</p> <p>11 that the pharmacies would have billed and the</p> <p>12 amount that Medi-Cal would have reimbursed.</p> <p>13 Table 3 shows the variation in pharmacy charges</p> <p>14 to Medi-Cal, by drug and manufacturer, for each</p> <p>15 of the six pharmacies in our sample. In</p> <p>16 addition, the table reflects the difference in</p> <p>17 Medi-Cal reimbursement limits.</p> <p>18 So looking at Table 3 -- and I'm going</p> <p>19 to focus on the tail end of Table 3, which is on</p> <p>20 Page 31, and it appears to me -- and you can</p> <p>21 correct me if you disagree -- that this table is</p> <p>22 showing different estimated acquisition costs for</p>	<p style="text-align: right;">Page 217</p> <p>1 A. No, I do not.</p> <p>2 Q. Looking at this document, and based on</p> <p>3 your experience as a pharmacist, would you agree</p> <p>4 with me that the acquisition cost for these</p> <p>5 pharmacies likely would have been something less</p> <p>6 than the amount listed in that column?</p> <p>7 When I say "that column," I mean</p> <p>8 "amount pharmacy would have charged Medi-Cal."</p> <p>9 MR. PAUL: Objection. Form.</p> <p>10 MR. GOBENA: Same objection.</p> <p>11 Speculation.</p> <p>12 THE WITNESS: Based on my knowledge as</p> <p>13 a pharmacist and based on the sub-note listed in</p> <p>14 the chart that says that that column includes a</p> <p>15 dispensing fee, one could conclude that the price</p> <p>16 for the drug was less than that price listed</p> <p>17 there.</p> <p>18 BY MR. COLE:</p> <p>19 Q. The acquisition cost was less than that</p> <p>20 price listed?</p> <p>21 A. You could conclude that, yes.</p> <p>22 Q. Okay. And again, I know that you</p>

55 (Pages 214 to 217)

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Gorospe, James Kevin

March 19, 2008

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<p style="text-align: right;">Page 218</p> <p>1 didn't prepare this report and you weren't even 2 working for Medi-Cal -- 3 A. Right. 4 Q. -- at the time it was written. 5 In your experience, a pharmacy would 6 charge Medi-Cal -- start over. 7 In your experience, a pharmacy would 8 not charge Medi-Cal less than what the pharmacy 9 paid to acquire the drug; is that fair? 10 MR. ZLOTNICK: Object to the form. 11 MR. GOBENA: I'll join in the 12 objection. 13 THE WITNESS: Yes, that's accurate. 14 BY MR. COLE: 15 Q. And looking at this column, Amount 16 Pharmacy Would Have Charged Medi-Cal, as you 17 noted, there's a footnote or a sub-note -- 18 whatever you want to call it -- that says it 19 includes a dispensing fee. 20 And if you were to back the dispensing 21 fee out of this column -- and again, the 22 dispensing fee around this time was approximately</p>	<p style="text-align: right;">Page 220</p> <p>1 THE WITNESS: Given the conditions you 2 just stated, the math would indicate that, yes. 3 BY MR. COLE: 4 Q. And then if you move over to the AWP 5 minus five percent column for that same product, 6 for Pharmacy B, you've got \$20.64 listed. 7 Do you see that? 8 A. Yes. 9 Q. And again, the footnote there indicates 10 that that figure, built into it is a \$4.05 11 dispensing fee; is that correct? 12 A. That's what the footnote says. 13 Q. So if you subtract \$4.05 from that 14 figure, you get down to \$16.59, if my math is 15 correct. Do you agree? 16 A. Yes, your math is correct. 17 Q. Okay. So -- and again, this is AWP 18 minus five percent. 19 So if you were to determine the AW -- 20 the straight AWP of this particular product, you 21 would have to add five percent, correct? 22 A. Actually, that isn't how the math would</p>
<p style="text-align: right;">Page 219</p> <p>1 \$4, or Footnote B says \$4.05; do you see that? 2 A. I see that. 3 Q. If you back that \$4.05 out of -- let's 4 look at Pharmacy B in this section. 5 If you back the \$4 -- if you subtract 6 the \$4.05 from the \$5.70 that's listed there, you 7 get approximately 1.65. \$1.65, if my math is 8 right; is that fair? 9 A. That makes the assumption that the 10 dispensing fee being charged -- that the pharmacy 11 is charging under that price was \$4.05. 12 Q. Correct. Assuming that -- 13 A. I can't make that assumption based on 14 the information provided here. 15 Q. I agree with you. It doesn't say \$4.05 16 in Footnote A, but if you -- let's assume that 17 the dispensing fee is the same. That would put 18 the ingredient cost component of the product -- 19 again, looking at Pharmacy B -- at a dollar -- 20 \$1.65. 21 MR. PAUL: Objection. Form. No 22 foundation.</p>	<p style="text-align: right;">Page 221</p> <p>1 work but I understand what you're describing. 2 You would not add five percent to a 3 lower amount because that would not get you to 4 the AWP. 5 Q. I agree with you. But the number would 6 be slightly higher than \$16.59, right? 7 A. That is correct. 8 Q. Okay. So if you compared, for Pharmacy 9 B, what we have described as the acquisition 10 costs, what we earlier talked about as the 11 ingredient cost of the product being \$1.65, the 12 AWP of that product would be at or around \$17, 13 somewhere in that neighborhood? 14 A. Approximately, that's correct. 15 Q. Okay. So anyone reading this report, 16 again, at DHS back in 1991, looking at this 17 particular table, could see that there was -- I 18 don't know what the percentage would be, but we 19 could certainly calculate it, but you have 20 Pharmacy B acquiring a generic drug product for 21 somewhere around \$1.65 and the AWP of that 22 product being somewhere in the neighborhood of</p>

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<p style="text-align: right;">Page 222</p> <p>1 \$17.</p> <p>2 A. Based on the information we've just</p> <p>3 discussed, yes.</p> <p>4 Q. Are you familiar with the term</p> <p>5 "spread"?</p> <p>6 A. Yes.</p> <p>7 Q. And what do you understand that to</p> <p>8 mean?</p> <p>9 A. My understanding of spread, as it</p> <p>10 relates to pharmaceuticals or prescription drugs,</p> <p>11 is the difference between what a provider</p> <p>12 purchases a product for and what they are</p> <p>13 reimbursed for that same product.</p> <p>14 Q. Looking solely at this column, average</p> <p>15 wholesale price minus five percent, would you</p> <p>16 agree with me that there are wide variations in</p> <p>17 the AWPs for this particular generic product?</p> <p>18 A. Yes.</p> <p>19 Q. And again, the numbers listed here</p> <p>20 aren't the AWPs. They're AWPs minus five</p> <p>21 percent, but if you gave each one of them a boost</p> <p>22 to compensate for that, you would have some of</p>	<p style="text-align: right;">Page 224</p> <p>1 product with an AWP of roughly one-third of that.</p> <p>2 A. That is accurate.</p> <p>3 Q. And again, anyone in DHS who you know</p> <p>4 was pouring through or reading this report, would</p> <p>5 be able to -- would have learned that there were</p> <p>6 these wide variations in AWPs for generic</p> <p>7 products --</p> <p>8 MR. GOBENA: Object to --</p> <p>9 BY MR. COLE:</p> <p>10 Q. -- correct?</p> <p>11 MR. GOBENA: Sorry. Objection.</p> <p>12 THE WITNESS: That is correct.</p> <p>13 (Exhibit Gorospe 017 was marked</p> <p>14 for identification.)</p> <p>15 BY MR. COLE:</p> <p>16 Q. I marked Exhibit 17.</p> <p>17 Dr. Gorospe, this is a Proposed Rule</p> <p>18 excerpt from the Code of Federal Regulations,</p> <p>19 Federal Register, Volume 39, Number 230, dated</p> <p>20 November 27, 1974, and I'm reading from the</p> <p>21 bottom of the document.</p> <p>22 Have you ever referred to or seen this</p>
<p style="text-align: right;">Page 223</p> <p>1 the products having an AWP of somewhere around,</p> <p>2 in the \$21 range, and some products having an AWP</p> <p>3 of half of that, correct?</p> <p>4 A. As you previously discussed, the AWP</p> <p>5 would be somewhere in the \$17 range for the</p> <p>6 upper, the higher priced products, and the other</p> <p>7 products would be below, because these numbers</p> <p>8 include the dispensing fee, as you previously</p> <p>9 noted.</p> <p>10 Q. Good point. The AWP, at least to that</p> <p>11 second product, would be somewhere in the \$17</p> <p>12 range, and if we looked at this first product</p> <p>13 listed, the one from Goldline, if you back out</p> <p>14 the dispensing fee, that figure drops to \$5.37?</p> <p>15 A. That's correct.</p> <p>16 Q. So the AWP would be somewhere between -</p> <p>17 - somewhere around \$6 roughly, maybe a little</p> <p>18 less?</p> <p>19 A. Yes, that's correct.</p> <p>20 Q. I wasn't a math major. So you would</p> <p>21 have one product with an AWP of around \$17, one</p> <p>22 generic product, and a therapeutically equivalent</p>	<p style="text-align: right;">Page 225</p> <p>1 regulation, proposed regulation before?</p> <p>2 A. Not that I can recall.</p> <p>3 Q. Okay. You were probably in junior high</p> <p>4 or high school at the time.</p> <p>5 A. High school.</p> <p>6 Q. Okay. But since the time that you've</p> <p>7 joined Medi-Cal, did you ever have occasion to</p> <p>8 review this proposed rule?</p> <p>9 A. Not that I can recall, no.</p> <p>10 Q. If you look towards the top of the</p> <p>11 middle column, it says -- there's a section</p> <p>12 called "acquisition costs."</p> <p>13 A. I'm sorry. Where? Oh, I see it.</p> <p>14 Q. It says: In referring to drug cost,</p> <p>15 current regulations specify cost as determined by</p> <p>16 the state. Most states use average wholesale</p> <p>17 price. Red Book data, Blue Book data, survey</p> <p>18 results or similar standard costs. Such standard</p> <p>19 prices are frequently in excess of actual</p> <p>20 acquisition costs to the retail pharmacist.</p> <p>21 Thus, to achieve maximum savings to the Medicaid</p> <p>22 program, the proposal requires the use of actual</p>

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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IN RE PHARMACEUTICAL INDUSTRY)

AVERAGE WHOLESALE PRICE )

LITIGATION )

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THIS DOCUMENT RELATES TO ) MDL No. 1456

State of California, ex rel. ) Civil Action:

Ven-A-Care v. Abbott ) 01-12258-PBS

Laboratories, Inc., et al. )

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VOL. II

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MONDAY, SEPTEMBER 22, 2008

--oOo--

VIDEOTAPED DEPOSITION OF

J. KEVIN GOROSPE, Pharm.D.

--oOo--

Reported By: CAROL NYGARD DROBNY, CSR No. 4018

Registered Merit Reporter

Gorospe, Pharm. D., J. Kevin - Vol. II

September 22, 2008

Sacramento, CA

Page 591	Page 593
<p>1     A. Yes.</p> <p>2     Q. Second to the last paragraph on that</p> <p>3 page the first sentence reads "It is clear and well</p> <p>4 documented that pharmacy reimbursement</p> <p>5 methodologies that rely on AWP and a low dispensing</p> <p>6 fee overpay pharmacies for drug ingredient costs</p> <p>7 and underpay them for the cost of dispensing the</p> <p>8 drug."</p> <p>9     Did I read that correctly?</p> <p>10    A. Yes.</p> <p>11    Q. Is that consistent with your</p> <p>12 understanding of pharmacy reimbursement methodology</p> <p>13 that rely on AWP?</p> <p>14    A. Yes.</p> <p>15    Q. And how long have you had that</p> <p>16 understanding?</p> <p>17    A. Again, as I previously stated, the late</p> <p>18 nineties.</p> <p>19    Q. If you turn to page 2, you'll see that</p> <p>20 under the heading "Drug Ingredient Costs" the first</p> <p>21 paragraph goes through some of the findings of the</p> <p>22 Myers and Stauffer study that we talked about</p>	<p>1 implemented minus 10 percent occurred before or</p> <p>2 after June of 2002?</p> <p>3     A. That is correct.</p> <p>4     Q. You would agree with me, though, that</p> <p>5 the rate study was referenced in the state's</p> <p>6 attempts to -- in the state's communications with</p> <p>7 CMS to seek approval of the AWP minus 10 percent?</p> <p>8     A. Yes.</p> <p>9     Q. The last paragraph on that page --</p> <p>10    Scratch that.</p> <p>11    The second to the last -- the second to</p> <p>12 last paragraph in the page, last sentence, states</p> <p>13 "Therefore, the Department proposed using a single</p> <p>14 and differentiated rate equal to AWP minus 20</p> <p>15 percent."</p> <p>16    Do you understand that to mean that the</p> <p>17 -- that they were not proposing to reimburse</p> <p>18 generics differently?</p> <p>19    A. That is correct.</p> <p>20    Q. And then the first sentence of the</p> <p>21 following paragraph states "A rate of AWP minus 20</p> <p>22 percent is still significantly higher than the</p>
Page 592	Page 594
<p>1 earlier; correct?</p> <p>2     A. Yes.</p> <p>3     Q. And in the last sentence it reads "It's</p> <p>4 clear from the information that the Department's</p> <p>5 current rate of AWP minus 10 percent does not</p> <p>6 accurately reflect the drug acquisition costs in</p> <p>7 the marketplace;" correct?</p> <p>8     A. Yes.</p> <p>9     Q. Do you agree with that statement or is</p> <p>10 that consistent with your understanding at the</p> <p>11 time?</p> <p>12    A. Yes.</p> <p>13    Q. The rate referenced there, AWP minus 10</p> <p>14 percent, was adopted after the study was performed;</p> <p>15 correct?</p> <p>16    A. I don't recall.</p> <p>17    Q. The rate of AWP minus 10 percent was --</p> <p>18 didn't become effective until after the Myers and</p> <p>19 Stauffer study was released; correct?</p> <p>20    A. That's correct.</p> <p>21    Q. I take it you don't recall whether the</p> <p>22 specific legislation or budget proposal that</p>	<p>1 pharmacy acquisition cost of generic drugs."</p> <p>2     Did I read that correctly?</p> <p>3     A. Yes.</p> <p>4     Q. Is that consistent with your</p> <p>5 understanding at the time?</p> <p>6     A. Yes.</p> <p>7     Q. Did you have that understanding also</p> <p>8 going back to the late nineties, that AWP minus 20</p> <p>9 percent is significantly higher than pharmacy</p> <p>10 acquisition costs for generic drugs?</p> <p>11    A. Yes.</p> <p>12    Q. Last sentence of that paragraph or that</p> <p>13 page, I guess, going over to the next page, "The</p> <p>14 reimbursement of generic drugs will still be</p> <p>15 significantly above pharmacy's acquisition costs."</p> <p>16    And then it goes on.</p> <p>17    Did I read that correctly?</p> <p>18    A. Yes.</p> <p>19    Q. Do you understand that to --</p> <p>20    Withdrawn.</p> <p>21    So was it your understanding to the</p> <p>22 extent you recall this proposal that the</p>

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# **EXHIBIT X**

Wells, Jerry

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Tallahassee, FL

Page 1

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

-----X

In Re: PHARMACEUTICAL INDUSTRY ) MDL No. 1456

AVERAGE WHOLESALE PRICE LITIGATION) CIVIL ACTION:

-----X 01-CV-12257-PBS

THIS DOCUMENT RELATES TO: )

U.S. ex rel. Ven-A-Care of the ) Judge Patti B.

Florida Keys, Inc., v. Abbott ) Saris

Laboratories, Inc., No. )

06-CV-11337-PBS; U.S. ex rel. ) Magistrate Judge

Ven-A-Care of the Florida Keys, ) Marianne Bowler

Inc. v. Abbott Laboratories, Inc., )

No. 07-CV-11618-PBS; U.S. ex rel. )

Ven-A-Care of the Florida Keys, ) DEPOSITION OF

Inc. v. Dey, Inc., et al., No. ) JERRY WELLS

05-11084-PBS; U.S. ex rel. )

Ven-A-Care of the Florida Keys, ) DECEMBER 15, 2008

Inc., et al. v. Boehringer ) TALLAHASSEE, FL

Ingelheim Corp., et al., No. )

07-10248-PBS )

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<p style="text-align: right;">Page 70</p> <p>1 in the 1987 time period?</p> <p>2 MS. ST. PETE-GRIFFITH: Object to the</p> <p>3 form.</p> <p>4 MS. WALLACE: Objection.</p> <p>5 THE WITNESS: I would have used that to</p> <p>6 explain the fact that pharmacy vendors were</p> <p>7 getting a discount off of the published price,</p> <p>8 the published AWP or suggested price that</p> <p>9 pharmacists should pay.</p> <p>10 BY MR. COOK:</p> <p>11 Q. If you look on Page 1 of this article,</p> <p>12 the second to last paragraph begins with the</p> <p>13 words "in Florida."</p> <p>14 Do you see that paragraph?</p> <p>15 A. Yes.</p> <p>16 Q. That paragraph indicates -- am I</p> <p>17 reading it correctly -- that Florida Medicaid</p> <p>18 officials had found that Florida Medicaid was</p> <p>19 paying an average of \$1.08 too much for each</p> <p>20 prescription drug because the published prices</p> <p>21 were inflated? Did I summarize that correctly?</p> <p>22 MS. ST. PETE-GRIFFITH: Object to the</p>	<p style="text-align: right;">Page 72</p> <p>1 price at that time was probably 21 or \$22. And</p> <p>2 if the reimbursement was based on AWP, the</p> <p>3 ingredient cost would have been about \$18. And</p> <p>4 if pharmacies were getting a 14 or 15 percent</p> <p>5 discount, you would get to the \$1.08 pretty</p> <p>6 easily.</p> <p>7 BY MR. COOK:</p> <p>8 Q. The next sentence reads, quote, "Other</p> <p>9 states cite examples of published prices being</p> <p>10 triple what pharmacists really paid," closed</p> <p>11 quote.</p> <p>12 Do you recall examples of published</p> <p>13 prices being triple what pharmacists really paid</p> <p>14 back in 1987?</p> <p>15 MS. ST. PETE-GRIFFITH: Object to the</p> <p>16 form.</p> <p>17 MS. WALLACE: Objection.</p> <p>18 THE WITNESS: I think that this</p> <p>19 paragraph includes the reference to the \$1.08,</p> <p>20 which would have been referencing the brand name</p> <p>21 prescription drug. And the other sentence is</p> <p>22 like a lot of things in newspaper articles, and</p>
<p style="text-align: right;">Page 71</p> <p>1 form.</p> <p>2 MS. WALLACE: Objection.</p> <p>3 THE WITNESS: That's what that</p> <p>4 statement says.</p> <p>5 BY MR. COOK:</p> <p>6 Q. Okay. Do you recall whether Florida</p> <p>7 Medicaid determined that they were paying \$1.08</p> <p>8 too much for each prescription drug because</p> <p>9 published prices were inflated back in 1987?</p> <p>10 MS. ST. PETE-GRIFFITH: Object to the</p> <p>11 form.</p> <p>12 MS. WALLACE: Objection.</p> <p>13 THE WITNESS: I don't recall the</p> <p>14 specifics on this, but I can certainly understand</p> <p>15 how we would have gotten there, to that number.</p> <p>16 BY MR. COOK:</p> <p>17 Q. Do you recall doing any sort of</p> <p>18 empirical analysis back in 1987?</p> <p>19 MS. ST. PETE-GRIFFITH: Object to the</p> <p>20 form.</p> <p>21 THE WITNESS: I recall doing a number</p> <p>22 of analyses in 1987. The average prescription</p>	<p style="text-align: right;">Page 73</p> <p>1 the press is talking about a different subject,</p> <p>2 was talking about some of the generic drugs where</p> <p>3 manufacturers were grossly overstating their</p> <p>4 AWPs.</p> <p>5 BY MR. COOK:</p> <p>6 Q. When you say that manufacturers were</p> <p>7 grossly overstating their AWPs, back in 1987, you</p> <p>8 knew that the AWPs for generic drugs could be</p> <p>9 three times the actual acquisition cost, correct?</p> <p>10 MS. ST. PETE-GRIFFITH: Object to the</p> <p>11 form.</p> <p>12 MS. WALLACE: Objection.</p> <p>13 THE WITNESS: We could find examples of</p> <p>14 that. That was in the early days of pricing</p> <p>15 databases, and we did not have good data on all</p> <p>16 drugs, but you could find instances of almost</p> <p>17 anything you wanted to find by doing invoice</p> <p>18 audits. But that's very tedious, so we didn't do</p> <p>19 that on every drug and every claim. Obviously,</p> <p>20 somebody had found an instance of that.</p> <p>21 BY MR. COOK:</p> <p>22 Q. You had referred earlier in your</p>

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<p style="text-align: right;">Page 206</p> <p>1 for single source brands.</p> <p>2 Q. And for innovator multisource products,</p> <p>3 what was the discount they were able to receive?</p> <p>4 A. It was 43.41 percent.</p> <p>5 Q. What are innovator multisource</p> <p>6 products?</p> <p>7 A. That is a product whose patent has</p> <p>8 expired but is still marketed by the original NDA</p> <p>9 applicant.</p> <p>10 Q. Do you have an expectation for what the</p> <p>11 discounts from AWP would be for noninnovator</p> <p>12 multisource products?</p> <p>13 A. Because those manufacturers and</p> <p>14 suppliers tend to overstate their AWPs, you can</p> <p>15 see 80 or 90 percent in some cases.</p> <p>16 Q. And you've known that since at least</p> <p>17 1995, right?</p> <p>18 MS. ST. PETER-GRIFFITH: Object to the</p> <p>19 form.</p> <p>20 MS. WALLACE: Objection to form.</p> <p>21 MR. BREEN: Objection, form.</p> <p>22 THE WITNESS: I don't know that I know</p>	<p style="text-align: right;">Page 208</p> <p>1 Proposal Analysis we looked at, right?</p> <p>2 MS. ST. PETER-GRIFFITH: Object to the</p> <p>3 form.</p> <p>4 THE WITNESS: That was a little</p> <p>5 different issue, but it would still apply.</p> <p>6 BY MR. COOK:</p> <p>7 Q. And that was the same issues that you</p> <p>8 saw discussed in response to the 1996 Florida-</p> <p>9 specific report about pricing for IV drugs and IV</p> <p>10 fluids, correct?</p> <p>11 MS. ST. PETER-GRIFFITH: Object to the</p> <p>12 form.</p> <p>13 THE WITNESS: That was a presumption</p> <p>14 that we had made in the 1996 period.</p> <p>15 BY MR. COOK:</p> <p>16 Q. Other than the meeting in Richmond in</p> <p>17 September of 1995, have you had discussions with</p> <p>18 anybody from HCFA about the deeper level of</p> <p>19 discounts that are available to purchasers of IV</p> <p>20 fluids and IV drugs via the pharmacy market?</p> <p>21 A. Very likely I have.</p> <p>22 Q. Is it fair to say you don't recall the</p>
<p style="text-align: right;">Page 207</p> <p>1 that to that extent in 1995. Certainly in 2001 I</p> <p>2 knew that.</p> <p>3 BY MR. COOK:</p> <p>4 Q. The sentence after you discussed the</p> <p>5 discounts from single source brands and innovator</p> <p>6 multisource products reads, quote, "These are</p> <p>7 predictable, confirm the ability of closed shop</p> <p>8 pharmacies to negotiate pricing concessions from</p> <p>9 pharmaceutical manufacturers that may not be</p> <p>10 available to community-based pharmacies," closed</p> <p>11 quote.</p> <p>12 Do you see that?</p> <p>13 A. Yes.</p> <p>14 Q. That was true in 2001, correct?</p> <p>15 MS. ST. PETER-GRIFFITH: Object to</p> <p>16 form.</p> <p>17 MS. WALLACE: Objection, form.</p> <p>18 THE WITNESS: I believed it to be true.</p> <p>19 That's why I put it in the letter.</p> <p>20 BY MR. COOK:</p> <p>21 Q. And that was the same phenomenon that</p> <p>22 you had observed in 1998 with the Legislative</p>	<p style="text-align: right;">Page 209</p> <p>1 specifics of those conversations from years ago,</p> <p>2 correct?</p> <p>3 MS. ST. PETER-GRIFFITH: Object to the</p> <p>4 form.</p> <p>5 THE WITNESS: Right. I have</p> <p>6 conversations with lots of people, or I did when</p> <p>7 I was working.</p> <p>8 BY MR. COOK:</p> <p>9 Q. Do you recall what the reaction of</p> <p>10 anybody from HCFA was to you describing these</p> <p>11 deeper discounts for home IV pharmacies?</p> <p>12 A. I don't recall reactions.</p> <p>13 Q. Do you recall how far back those</p> <p>14 conversations with individuals at HCFA go?</p> <p>15 A. No.</p> <p>16 Q. Have you discussed that issue with</p> <p>17 anyone from other state Medicaid programs?</p> <p>18 A. Yes.</p> <p>19 Q. Do you recall who in other state</p> <p>20 Medicaid programs you have had specific levels of</p> <p>21 conversation with?</p> <p>22 A. I don't recall specific instances, but</p>

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<p style="text-align: right;">Page 210</p> <p>1 that's an issue that comes up at the annual 2 meetings at the southern and national groups that 3 I attended and the western and eastern groups 4 when I attended them. There were almost always 5 some discussion of those kinds of discounts.</p> <p>6 Q. Do you recall how far back those 7 discussions go at these meetings?</p> <p>8 A. I do not.</p> <p>9 Q. I have an attendee list from 1996 that 10 shows you attended a National Symposium of 11 Pharmacy Administrators. Do you recall attending 12 these meetings as far back as 1996?</p> <p>13 A. And earlier.</p> <p>14 Q. Do you recall the issue of the 15 additional discounts available to purchasers of 16 home IV products and IV drugs and IV fluids being 17 a topic of conversation during the time period in 18 which the OIG study was going on in the '94, '95 19 time period?</p> <p>20 A. I don't recall specifically whether or 21 not they were discussed at that time period. 22 That's too far back for me to remember the</p>	<p style="text-align: right;">Page 212</p> <p>1 Q. Have you ever discussed this issue 2 relating to the discounts for generic drugs 3 generally, but home IV and infusion drugs more 4 specifically, have you ever had that discussion 5 with anyone from the state of Alabama?</p> <p>6 A. Probably have.</p> <p>7 Q. Who --</p> <p>8 A. I don't recall the specifics, but I 9 probably have because we've discussed it at the 10 southern meetings which they attend and the 11 national meetings which they attend.</p> <p>12 Q. Are there any individuals that you 13 would have been most likely to have that 14 conversation with from the state of Alabama?</p> <p>15 A. There was only a couple of people that 16 I recall that have been active in Alabama for the 17 last few years, so it would be one or both of 18 them.</p> <p>19 Q. And what are their names?</p> <p>20 A. I don't recall their names.</p> <p>21 Q. And these are people that were most 22 recently active at the Alabama state Medicaid</p>
<p style="text-align: right;">Page 211</p> <p>1 sequence of events.</p> <p>2 Q. Do you recall Ben Jackson or Paul 3 Chesser or Bill Shrigley from the OIG speaking at 4 any of these conferences?</p> <p>5 A. It seems to me that I recall two or 6 three different times that one or more of them 7 would attend and make a presentation.</p> <p>8 Q. Do you recall what the subject matters 9 generally were of the presentations that those 10 gentlemen would make at these meetings?</p> <p>11 A. Their subject matter was always the 12 same. It was always drug pricing.</p> <p>13 Q. At each of these, would these gentlemen 14 refer to the deeper discounting that was 15 available in the home IV and infusion market?</p> <p>16 MR. BREEN: Objection to form.</p> <p>17 THE WITNESS: I don't recall that. In 18 one of their presentations -- I misspoke a minute 19 ago. At one time they did a presentation that 20 was devoted to a study they had done on 21 dispensing costs.</p> <p>22 BY MR. COOK:</p>	<p style="text-align: right;">Page 213</p> <p>1 program or back in the '90s and '80s?</p> <p>2 A. I think that the people that were there 3 last year, one of the ladies is now departed and 4 gone to some other effort, and one, I think, is 5 still with the Alabama Medicaid program, but I 6 think they were there for eight or ten years.</p> <p>7 Q. And when you're referring to the people 8 that you are mostly to have had these 9 conversations with, you are referring to those 10 two ladies, correct?</p> <p>11 A. I am.</p> <p>12 (Exhibit Abbott-Wells 1011 was 13 marked for identification.)</p> <p>14 BY MR. COOK:</p> <p>15 Q. I will mark this as Exhibit 1011, 16 previously marked as Exhibit Roxane 154. This a 17 September 16, 2002 report entitled Additional 18 Analyses of the Actual Acquisition Cost of 19 Prescription Drug Products. And it is the 20 additional report issued by the OIG following 21 this 1999 invoice study that we were looking at 22 earlier.</p>

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<p style="text-align: right;">Page 222</p> <p>1 rebate statute, but I know that they do discount 2 those drugs more heavily after the patent has 3 expired.</p> <p>4 Q. And that would be consistent with what 5 you understand from competition in the free 6 market, correct?</p> <p>7 MS. ST. PETER-GRIFFITH: Object to the 8 form.</p> <p>9 MS. WALLACE: Objection, form.</p> <p>10 THE WITNESS: I think I can answer yes 11 to that.</p> <p>12 BY MR. COOK:</p> <p>13 Q. Right. The histogram that appears on 14 Page 9, the distribution of some very steeply 15 discounted products, and then a mode there at the 16 15 to 20 percent range but a smaller one at the 17 far left, is that consistent with your 18 understanding of the distribution of transaction 19 prices as compared to AWP for generic products?</p> <p>20 MR. BREEN: Objection to form.</p> <p>21 THE WITNESS: No. That specific bar of 22 the graph at the 20 percent level is a little</p>	<p style="text-align: right;">Page 224</p> <p>1 distribution curve for discounts.</p> <p>2 Q. And when you talk about manufacturers 3 inflating the average wholesale price, would you 4 agree with me that this indicates that virtually 5 all of the average wholesale prices for the 6 generic drugs that are represented in this graph 7 are at least four times greater than the average 8 acquisition cost for those products?</p> <p>9 MS. ST. PETER-GRIFFITH: Object to the 10 form.</p> <p>11 MS. WALLACE: Objection, form.</p> <p>12 THE WITNESS: I can't do the math that 13 quickly, but I would agree that they are higher.</p> <p>14 BY MR. COOK:</p> <p>15 Q. The outlier would the generic drug that 16 is sold somewhere close to AWP, not the generic 17 drug that's sold for five cents on the dollar, 18 right?</p> <p>19 MS. ST. PETER-GRIFFITH: Object to the 20 form.</p> <p>21 MS. WALLACE: Objection to form.</p> <p>22 THE WITNESS: I would agree.</p>
<p style="text-align: right;">Page 223</p> <p>1 strange looking to me. I would want to look 2 closer at the data.</p> <p>3 BY MR. COOK:</p> <p>4 Q. And when this chart refers to multiple 5 source drugs with the federal upper limit, those 6 are drugs that have, is it your understanding, at 7 least three generic competitors in the 8 marketplace?</p> <p>9 MS. ST. PETER-GRIFFITH: Object to 10 form.</p> <p>11 THE WITNESS: At least three marketers.</p> <p>12 It could be the innovator plus two generic.</p> <p>13 BY MR. COOK:</p> <p>14 Q. Leaving aside the far left side of the 15 graph that is 10 to 20 percent discount.</p> <p>16 A. Uh-huh.</p> <p>17 Q. The right side of the graph with the 18 increasing number of discounts all the way up to 19 more than 90 percent off, is that consistent with 20 your understanding of how deeply discounted 21 generic products tend to be in the marketplace?</p> <p>22 A. That looks like a more normal</p>	<p style="text-align: right;">Page 225</p> <p>1 BY MR. COOK:</p> <p>2 Q. And is that consistent with your 3 understanding of the way generic drugs are priced 4 in the marketplace?</p> <p>5 A. I think --</p> <p>6 MS. ST. PETER-GRIFFITH: Object to the 7 form.</p> <p>8 MS. WALLACE: Objection to form.</p> <p>9 THE WITNESS: -- so.</p> <p>10 MS. ST. PETER-GRIFFITH: Counsel, can 11 we get a time period you're talking about?</p> <p>12 BY MR. COOK:</p> <p>13 Q. That's been your understanding of the 14 way generic drugs have been priced in the 15 marketplace since at least the mid-1990's, 16 correct?</p> <p>17 MR. BREEN: Objection to form.</p> <p>18 MS. WALLACE: Objection to form.</p> <p>19 MS. ST. PETER-GRIFFITH: Object to the 20 form.</p> <p>21 MR. BREEN: Can we read the whole 22 question back?</p>

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<p style="text-align: right;">Page 230</p> <p>1 you trying to set the MAC at exactly the 2 acquisition cost of providers or at some point 3 above or below the acquisition cost for 4 providers?</p> <p>5 A. We would not have tried to set 6 acquisition or the reimbursement level below 7 acquisition cost. We would try to set the 8 reimbursement level at a point where 95 percent 9 of the providers could purchase the drug at or 10 below that price.</p> <p>11 Q. Now, the dispensing fee in Florida has 12 remained the same in Florida, of course, from 13 1986 until 2007, correct?</p> <p>14 A. That's correct.</p> <p>15 MS. ST. PETER-GRIFFITH: Object to the 16 form.</p> <p>17 BY MR. COOK:</p> <p>18 Q. And that's primarily relevant to the 19 retail pharmacy, correct?</p> <p>20 MS. WALLACE: Objection to form.</p> <p>21 MS. ST. PETER-GRIFFITH: Object to the 22 form.</p>	<p style="text-align: right;">Page 232</p> <p>1 providers can purchase the product at or below 2 that price.</p> <p>3 Q. I'm not a statistician, so I don't know 4 that I can frame this right. Do you know what 5 sort of --</p> <p>6 A. And I wouldn't know whether you did or 7 not, so that's okay.</p> <p>8 Q. Do you know what sort of variance there 9 tends to be in the amount that providers pay for 10 these products? That is, when you're hitting the 11 95 percent level where 95 percent of providers 12 can purchase it, do you have a feel for how wide 13 the variation can be below that 95th percentage 14 point?</p> <p>15 A. Well, yes, because we would look 16 something like your histogram for AWP discounts 17 almost. We looked at invoices and catalogs and 18 set state MAC prices when we were doing that 19 internally. And I would usually email that 20 information to Walgreens or Wal-Mart or CVS and 21 to a half of dozen independents or to the Florida 22 Pharmacy Association and say, I'm looking at</p>
<p style="text-align: right;">Page 231</p> <p>1 THE WITNESS: No.</p> <p>2 BY MR. COOK:</p> <p>3 Q. I can ask that in a better way. That 4 same -- while that same -- forget it.</p> <p>5 Costs have gone up at the retail 6 pharmacy from 1986 to 2007, correct?</p> <p>7 A. I'm sure they have.</p> <p>8 Q. In setting state MACs, do you make an 9 effort to set the ingredient costs at a point 10 where the total reimbursement, the ingredient 11 cost plus the dispensing fee, covers pharmacies' 12 costs for dispensing that product?</p> <p>13 MS. ST. PETER-GRIFFITH: Object to the 14 form.</p> <p>15 MS. WALLACE: Objection to form.</p> <p>16 THE WITNESS: No.</p> <p>17 BY MR. COOK:</p> <p>18 Q. What is your goal in setting the MAC?</p> <p>19 A. I just stated that, I think, but I'll 20 restate it. The goal of setting a MAC price is 21 to set the price as low as you can set it where 22 somewhere in the neighborhood of 95 percent of</p>	<p style="text-align: right;">Page 233</p> <p>1 these pricing levels on these drugs, give me some 2 feedback, can you buy them at that level, this is 3 what we think it ought to be.</p> <p>4 Q. Uh-huh.</p> <p>5 A. And if I set it too low, they'd scream 6 a lot. If I set it too high, they'd say, well, 7 that looks fine, we can just barely make it.</p> <p>8 Q. Have you gone through that process for 9 the infusion and IV drugs listed in the complaint 10 in this case?</p> <p>11 A. No.</p> <p>12 Q. So those are still being paid based 13 upon --</p> <p>14 A. They are being paid based upon the 15 provisions of the Deficit Reduction Act of 2005 16 at this point, which mandated the State of 17 Florida adopting those -- that pricing logic 18 based on manufacturer rebate levels to calculate 19 the average manufacturer price.</p> <p>20 Q. And that's at 250 percent of the 21 average manufacturer's price, correct?</p> <p>22 A. That's correct.</p>

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<p style="text-align: right;">Page 338</p> <p>1     <b>H I G H L Y   C O N F I D E N T I A L</b>    2    customary charge. That remains in the Federal    3    Code of Federal Regulations today.    4    <b>BY MR. COOK:</b>    5      Q. The 1987 article that Mr. Breen    6     referred you to where you referred to AWP as a    7     sticker price, you said that the sticker price    8     analogy doesn't apply to generics, right?    9      MS. ST. PETER-GRIFFITH: Objection to    10    form.    11     MR. BREEN: Objection to form.    12     THE WITNESS: At this point that would    13    not be an appropriate analogy to use for generic    14    products.    15    <b>BY MR. COOK:</b>    16     Q. And you said that it didn't apply to    17    generics because the pricing of generics is all    18    over the place, right?    19     A. It is now, and probably was even, to    20    some extent, at that point.    21     Q. And just so I can nail down the    22    distinction you're drawing here, are you drawing</p>	<p style="text-align: right;">Page 340</p> <p>1     <b>H I G H L Y   C O N F I D E N T I A L</b>    2    form.    3      MS. WALLACE: Object to form.    4      THE WITNESS: I don't know that that    5     article said that. There was a letter from Ven-    6     a-Care that mentioned that AWP was a joke.    7      AWP was a pricing reference point that    8     is a reasonable indicator of approximate cost for    9     brand name drugs. It is no longer a reasonable    10    indicator for generic drugs and I don't know when    11    that diversion occurred. At one point it    12    probably was a reasonable indicator for generic    13    drugs.    14    <b>BY MR. COOK:</b>    15     Q. Certainly by 1990 it was no longer a    16    reasonable indicator of price for generic drugs,    17    correct?    18     MS. WALLACE: Object to form.    19     MS. ST. PETER-GRIFFITH: Object to the    20    form.    21     MR. BREEN: Objection to form.    22     THE WITNESS: I think that by 1990 that</p>
<p style="text-align: right;">Page 339</p> <p>1     <b>H I G H L Y   C O N F I D E N T I A L</b>    2    a distinction between brands and generics in the    3    sense that the relationship between published    4    prices and acquisition prices for generics are    5    not -- do not bear a predictable relationship?    6      MR. BREEN: Objection to the form.    7      MS. WALLACE: Objection, form.    8      THE WITNESS: The analogy for the    9     automobile window sticker that I used was    10    specifically related to brand name drugs in the    11    mid to late 1980s.    12    <b>BY MR. COOK:</b>    13     Q. In the article, there are quotes    14    referring to AWP as, quote, "meaningless" and,    15    quote, "a joke."    16     MS. ST. PETER-GRIFFITH: Objection to    17    form.    18     MR. BREEN: Objection to form.    19    <b>BY MR. COOK:</b>    20     Q. Would that be a better characterization    21    for AWP with respect to generics?    22     MS. ST. PETER-GRIFFITH: Objection to</p>	<p style="text-align: right;">Page 341</p> <p>1     <b>H I G H L Y   C O N F I D E N T I A L</b>    2    would be a valid statement.    3      MR. COOK: I don't have any more    4    questions.    5      MS. ST. PETER-GRIFFITH: I have nothing    6    further.    7      MR. COOK: I think we're done. Thank    8    you very much.    9      MR. YOUNG: Mr. Wells, just one or two    10    question to follow up.    11    12                   <b>EXAMINATION</b>    13    <b>BY MR. YOUNG:</b>    14     Q. Mr. Wells, just to follow up on some of    15    the questions Mr. Cook was just asking you, when    16    you were talking about average prices in response    17    to questions by Mr. Breen, were you responding    18    with respect to branded drugs as well?    19     MS. ST. PETER-GRIFFITH: Objection to the    20    form.    21     THE WITNESS: I don't recall the    22    context of the question.</p>

# **EXHIBIT Y**

Springfield, IL

Page 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

-----X

IN RE: PHARMACEUTICAL INDUSTRY )

AVERAGE WHOLESALE PRICE LITIGATION ) MDL No. 1456

-----) Civil Action

THIS DOCUMENT RELATES TO: ) No. 01-12257-PBS

United States of America, ex. rel. ) Hon. Patti Saris

Ven-a-Care of the Florida Keys, ) Magistrate Judge

Inc., v. Abbott Laboratories, Inc., )

Civil Action No. 06-11337-PBS; and )

United States of America, ex. rel. ) VIDEOTAPED

Ven-a-Care of the Florida Keys, ) DEPOSITION OF

Inc., v. Dey, Inc., et. al., Civil ) THE ILLINOIS

Action No. 05-11084-PBS; and United) DEPARTMENT OF

States of America, ex. rel. ) HEALTHCARE AND

Ven-a-Care of the Florida Keys, ) FAMILY SERVICES

Inc., v. Boehringer Ingelheim ) by JAMES PARKER

Corp. et. al., Civil Action )

No. 07-10248-PBS. ) NOVEMBER 18, 2008

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## Springfield, IL

<p style="text-align: right;">Page 182</p> <p>1 Q. And the reason that this budget 2 initiative was proposed was because AWP had 3 become virtually meaningless as a real number, 4 particularly for multi source drugs, correct? 5 A. That is correct. 6 Q. And it states, "The AWP is set by each 7 drug manufacturer and reported to the various 8 drug information services, but in actuality it is 9 no longer used by wholesalers selling to 10 pharmacies," correct? 11 A. That is what it says. 12 Q. And it states that, "Factors such as 13 volume discounts and rebates by wholesalers or 14 manufacturers are examples of changes that have 15 made AWP meaningless," correct? 16 A. Correct. 17 Q. And, in 1996, IDPA used AWP as part of 18 its reimbursement methodology, correct? 19 A. That's correct. 20 Q. And it continues to use AWP today? 21 A. That is correct. 22 Q. And in 1996 through December of 2000,</p>	<p style="text-align: right;">Page 184</p> <p>1 THE WITNESS: Some people may have had 2 that opinion. It depends on what they meant by 3 "virtually meaningless." We certainly knew it 4 did not mean what the common understanding of the 5 words would mean. 6 BY MR. REALE: 7 Q. Well, it -- a document from the 8 Director of the IDPA dated September 10th, 1994 9 refers to AWP as being meaningless, particularly 10 so for multi source drugs, correct? 11 A. That is correct. 12 Q. And at one time, Illinois Medicaid used 13 Actual Acquisition Cost to reimburse pharmacies, 14 correct? 15 A. That is correct. 16 Q. And there's nothing stopping Illinois 17 from continuing to use actual acquisition cost to 18 reimburse pharmacies today? 19 MR. LIBMAN: Objection to form. 20 THE REPORTER: You know what, I lost 21 your question. I'm so sorry. "There's nothing 22 stopping Illinois from using the actual..."</p>
<p style="text-align: right;">Page 183</p> <p>1 it didn't use Wholesale Acquisition Cost-plus 2 method, correct? 3 A. That is correct. 4 Q. Now, if Illinois Medicaid understood 5 that AWP had become virtually meaningless as a 6 real number, particularly for multi source drugs, 7 why did it continue to use that benchmark as part 8 of its payment methodology? 9 A. Because there was no viable 10 alternative. So the best approach to Estimated 11 Acquisition Cost was to continue to try to figure 12 out the best discount off of AWP to estimate 13 acquisition cost. 14 Q. But they understood it was virtually 15 meaningless in so doing? 16 MS. OBEREMBT: Objection. 17 MR. LIBMAN: Objection. Objection to 18 form. 19 BY MR. REALE: 20 Q. That AWP was virtually meaningless? 21 A. Well, I -- 22 MS. OBEREMBT: Same objection.</p>	<p style="text-align: right;">Page 185</p> <p>1 MR. REALE: Acquisition cost to 2 reimburse pharmacies today. 3 THE WITNESS: There's nothing that 4 legally prohibits us from doing that. 5 BY MR. REALE: 6 Q. And they did at one time? 7 A. And we did at one time. 8 Q. Did you talk to Mr. Hazelwood about 9 Roxane Illinois Exhibit 5 and in particular the 10 proposal in September of 1994? 11 A. Not about this document, no. 12 (Exhibit Roxane IL 006 was marked 13 for ID) 14 BY MR. REALE: 15 Q. Mr. Parker, you've just been handed 16 another exhibit which we've marked as Roxane 17 Illinois Exhibit 6, Bates No. AWP-IL-16734 to 18 16755. The title of this document is 19 "Budget/System Impact Fiscal Year 1995." Do you 20 recognize this type of document? 21 MR. LIBMAN: Take your time to review 22 it if you need to, Mr. Parker.</p>

# **EXHIBIT Z**

Baton Rouge, LA

Page 1

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL \* MDL NO. 1456  
INDUSTRY AVERAGE WHOLESALE \* MASTER FILE NO.  
PRICE LITIGATION \* 01-CV-12257-PBS  
\*  
THIS DOCUMENT RELATES TO: \* JUDGE PATTI B.  
U.S. EX REL. VEN-A-CARE OF \* SARIS  
THE FLORIDA KEYS, INC. V. \* MAGISTRATE  
DEY INC., ET AL \* MARIANNE BOWLER  
NO. 05-11084-PBS, AND \*  
U.S. EX REL VEN-A-CARE OF \*  
THE FLORIDA KEYS, INC., ET \*  
AL V. BOEHRINGER INGELHEIM \* (Cross-noticed  
CORP, ET AL \* captions on  
NO.07-10248-PBS \* following pages.)

\* \* \* \* \*

November 7, 2008

Transcript of the videotaped Rule

30(b) (6) deposition of the LOUISIANA  
DEPARTMENT OF HEALTH AND HOSPITALS through  
MARY JULIA TERREBONNE

## Baton Rouge, LA

<p style="text-align: right;">Page 42</p> <p>1 generic drugs to encourage the use of generic 2 drugs?" And your response is, "I think you could 3 do that a multiple of ways, not necessarily on 4 the ingredient side but on the dispensing fees."</p> <p>5 And the follow-up question is "But one 6 of the ways is through the ingredient size; 7 correct?" And your answer is "One of the ways, 8 yes."</p> <p>9 Sitting here today as a representative 10 for the State of Louisiana, do you adopt your 11 prior testimony on this point?</p> <p>12 A. Yes.</p> <p>13 Q. On page 163 of your deposition 14 transcript there is a discussion about a 15 proposal, a state plan amendment seeking an 16 increase of the dispensing fee for generic drugs 17 to \$15 and an increase of the dispensing fee for 18 brand names to \$10. Do you recall that 19 discussion?</p> <p>20 A. As I see it, yes.</p> <p>21 Q. You're aware that there was this effort 22 --</p>	<p>1 paraphrase. He's asking you whether -- what the 2 intention of the -- what the intention of the 3 legislation was in increasing the dispensing 4 fees. And he asks whether -- whether the 5 intention was for, quote, "the legislature" -- 6 Excuse me -- "The legislature wanted to make up 7 for taking that away by increasing the dispensing 8 fees for generics; correct?" And you answer, 9 "That is my understanding of the legislation."</p> <p>10 Do you -- Sitting here today as the 11 representative for the State of Louisiana, is it 12 your understanding that the -- that the intention 13 of the state plan amendment to seek a dispensing 14 -- an increase in the dispensing fee was to try 15 to make up for taking away the spread between AWP 16 and actual acquisition cost or reducing the 17 spread between AWP and actual acquisition cost 18 for generic drugs?</p> <p>19 A. I believe the intent of the legislation 20 was due in part from the federal upper limits 21 being implemented as a result of the DRA.</p> <p>22 Q. Right. And -- and that's the part of</p>
<p style="text-align: right;">Page 43</p> <p>1 A. Yeah.</p> <p>2 Q. -- submitted in a state plan amendment?</p> <p>3 The discussion continues to page 164 of 4 your deposition transcript, and if you scroll to 5 line 13, the questioner notes that there's a 6 larger spread between AWP and actual acquisition 7 cost for generic drugs as a percentage.</p> <p>8 Sitting here today as the State of 9 Louisiana's -- as a representative of the State 10 of Louisiana, do you agree that there is a larger 11 spread between AWP and actual acquisition cost 12 for generic drugs as a percentage when compared 13 to brand drugs?</p> <p>14 MR. FAUCI: Object to the form.</p> <p>15 THE WITNESS: I'm aware of it, yes.</p> <p>16 BY MS. RANKIN:</p> <p>17 Q. On line 17 the questioner notes that 18 the state plan amendment that was seeking an 19 increase to \$15 dispensing fee for generic drugs 20 and \$10 dispensing fee for brand names, he notes 21 that, quote, "The legislature wanted to -- to 22 make up for taking" -- I apologize. I will</p>	<p>1 the discussion here. Let's just -- let's just 2 look at page 164 of your transcript because 3 that's the -- that's the proposal that's being 4 discussed here.</p> <p>5 The question says, "And the proposal to 6 increase dispensing fees was due in large part to 7 the potential reduction and the ingredient cost 8 reimbursement due to the use of the AMP?" And 9 you respond "Yes."</p> <p>10 And the question -- questioner 11 continues on line 9, "And if that were 12 implemented, that would cut back on reimbursement 13 for generic drugs considerably; correct?" And 14 you respond "Yes."</p> <p>15 Then the questioner continues "Because 16 there is larger spread on AWP and actual 17 acquisition cost for generic drugs as a 18 percentage?" And your response is "Yes."</p> <p>19 And the questioner continues, "And so 20 the legislature wanted to make up for taking that 21 away by increasing the dispensing fees for 22 generics; correct?" And your response is "That</p>

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<p style="text-align: right;">Page 46</p> <p>1 is my understanding of the legislation."</p> <p>2 Sitting here today as the</p> <p>3 representative for the State of Louisiana, do you</p> <p>4 agree with your prior testimony on this point?</p> <p>5 A. Yeah.</p> <p>6 Q. Turn to page 44 of this document,</p> <p>7 please. On page 171 of your deposition</p> <p>8 transcript, you and Mr. Torborg are discussing</p> <p>9 the Myers and Stauffer survey of dispensing</p> <p>10 costs. Do you recall the Myers and Stauffer</p> <p>11 survey of dispensing costs that's being discussed</p> <p>12 here?</p> <p>13 A. I'm assuming that's the one that goes</p> <p>14 back to 1999.</p> <p>15 Q. I can pull it out for you if you'd like</p> <p>16 me to.</p> <p>17 A. Yeah.</p> <p>18 Q. This is Abbott Exhibit 1051, "A Survey</p> <p>19 of Dispensing and Acquisition Costs of</p> <p>20 Pharmaceuticals in the State of Louisiana." It's</p> <p>21 been previously marked.</p> <p>22 MR. FAUCI: Are we introducing this</p>	<p style="text-align: right;">Page 48</p> <p>1 BY MS. RANKIN:</p> <p>2 Q. And on page 172 Mr. Torborg asked you</p> <p>3 if you knew that there was a wider variation for</p> <p>4 discounts from AWP for generic drugs, and on line</p> <p>5 14 of page 172 you say "Yes."</p> <p>6 Sitting here today as a representative</p> <p>7 for the State of Louisiana, do you agree with and</p> <p>8 adopt this -- your prior testimony on this point?</p> <p>9 A. Yes, based on the survey.</p> <p>10 Q. The survey from 1999?</p> <p>11 A. Correct.</p> <p>12 Q. Please turn to page 47 of this</p> <p>13 document, page 185 of your testimony. Let me</p> <p>14 know when you get there.</p> <p>15 A. (Witness examines documents.) I'm</p> <p>16 there.</p> <p>17 Q. On line 9 of page 185, Mr. Torborg asks</p> <p>18 you: As far as you can recall, you've always</p> <p>19 been aware of the joke, quote, "AWP equals ain't</p> <p>20 what's paid," unquote, and your response on line</p> <p>21 13 is "Pretty much, yes. It's a running joke,"</p> <p>22 unquote.</p>
<p style="text-align: right;">Page 47</p> <p>1 today?</p> <p>2 MS. RANKIN: Excuse me?</p> <p>3 MR. FAUCI: Are we introducing this</p> <p>4 today?</p> <p>5 MS. RANKIN: I'm just using it to</p> <p>6 refresh her recollection. It's been previously</p> <p>7 marked, so --</p> <p>8 MR. FAUCI: Oh. Okay.</p> <p>9 BY MS. RANKIN:</p> <p>10 Q. This is the exhibit that was being</p> <p>11 discussed on page 171 of your deposition there.</p> <p>12 A. (Witness examines documents.)</p> <p>13 Q. And there is a discussion that starts</p> <p>14 on line 15 of page 171 about an excerpt in this</p> <p>15 report on page 6 which notes the -- Myers and</p> <p>16 Stauffer's conclusion that, quote, "The discounts</p> <p>17 from AWP for multiple-source drugs exhibited much</p> <p>18 greater variation but averaged 32.6 percent for</p> <p>19 drugs without FUL pricing and 69.6 percent for</p> <p>20 drugs with FUL pricing."</p> <p>21 MS. RANKIN: For your benefit, that's</p> <p>22 F-U-L, big caps, F-U-L, not f-u-l-l.</p>	<p style="text-align: right;">Page 49</p> <p>1 Sitting here today as the</p> <p>2 representative for the State of Louisiana, is it</p> <p>3 fair to say that the joke "AWP equals ain't</p> <p>4 what's paid" is a running joke that's been known</p> <p>5 for some time for the State of Louisiana?</p> <p>6 MR. FAUCI: Object to the form.</p> <p>7 THE WITNESS: I wouldn't say just for</p> <p>8 the State of Louisiana. It's just a common</p> <p>9 statement.</p> <p>10 BY MS. RANKIN:</p> <p>11 Q. But you're a representative for the</p> <p>12 state -- you're a representative for the State of</p> <p>13 Louisiana, and here you're acknowledging that</p> <p>14 you've been aware of the AWP ain't what's paid</p> <p>15 joke for as long as you can remember?</p> <p>16 A. Yes.</p> <p>17 Q. Is that right?</p> <p>18 A. Yes.</p> <p>19 Q. Sitting here today, would you like to</p> <p>20 correct your testimony here? Is there anything</p> <p>21 erroneous in your testimony on this point?</p> <p>22 A. No.</p>